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A “DIGNIFIED LIFE” AND THE RESURGENCE OF SOCIAL RIGHTS

*By Thomas M. Antkowiak¹**

ABSTRACT—The international human rights movement and its institutions have faced searing criticism that they have abandoned social, economic, and cultural rights (“social rights”). While favorable treaties and constitutions have proliferated over the last decades, grave poverty, inequality, and disease still run rampant across the globe. Many have attributed the latest rise of demagogues and terrorist groups to this widespread social disenfranchisement.

The supranational human rights courts have historically avoided social rights enforcement due to limited subject-matter jurisdiction. Yet more recently the Inter-American Court of Human Rights introduced a conceptual breakthrough to assess social rights, which was affirmed by the U.N. Human Rights Committee at the end of 2018. These advances reveal a building, although controversial, movement among supranational tribunals to hold States accountable for ensuring a “dignified life” and various social rights.

In Parts I and II, this article will examine these international legal developments, which primarily involve the integration of social rights into the right to life. In Part III, the article will then assess this expansive right-to-life approach, considering its consensual, suprapositive, and institutional aspects. When these three aspects are balanced, a court’s interpretation contributes to making its treaty system “justifiable, politically acceptable, and effective.”

The Inter-American Court has recognized that the fundamental right to life will never be meaningful and effective without nutrition, water, health care, housing, education, and ancestral lands. By establishing that these elements are indivisible from life, the Court also justified its expansion of remedies to safeguard many individuals and communities at risk. While States originally did not draft this “right to a dignified life,” they have

¹* Associate Professor of Law, Seattle University School of Law. I thank Paolo Carozza, Jorge Contesse, Bernard Duhaime, Gerald Neuman, Matiangai Sirleaf, and Alejandra Gonza for their valuable comments on previous drafts. Also, I appreciate the helpful feedback received during presentations at the Notre Dame Law School faculty workshop, the ASIL-Midwest colloquium, and the ASIL Annual Meeting panel, “Regional Human Rights Bodies as Instruments of International Law.”

permitted it to develop in the Inter-American System, as it aligns with their emphasis—at least in principle—on human dignity and respectable living conditions. The article concludes that the right to a dignified life, despite certain drawbacks examined, is a sensible approach to protect several intertwined rights, because it reasonably balances consensual, suprapositive, and institutional factors. If the Inter-American Court remains committed to its development, the evolving right to a dignified life will become increasingly protective, as well as progressively influential for both supranational tribunals and national legal institutions.

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I. INTRODUCTION

A. *Overview*

The international human rights movement and its institutions have faced searing criticism that they have abandoned social, economic, and cultural rights (“social rights”). While relevant treaties, favorable constitutions, and human rights attorneys have proliferated over the last decades, grave poverty, inequality, and disease still run rampant across the globe. Many have attributed the latest rise of demagogues and terrorist groups to this widespread social disenfranchisement.²

² See, e.g., ROBERT KUTTNER, CAN DEMOCRACY SURVIVE GLOBAL CAPITALISM? (2018); Caleb Crain, *Is Capitalism a Threat to Democracy?*, THE NEW YORKER (May 7, 2018), available at <https://www.newyorker.com/magazine/2018/05/14/is-capitalism-a-threat-to-democracy>; Social Charter of the Americas, AG/doc.5242/12 rev. 2, art. 1 (Sept. 20, 2012) (“Development with equity strengthens and consolidates democracy, since the two are interdependent and mutually reinforcing.”); Eur. Parl. Ass., *Additional protocol to the European Convention on Human Rights concerning fundamental social rights*, 3rd Sess., Doc. No. 8357 (1999) (“If democracy is to be firmly rooted in Europe, it is necessary to guarantee greater effectiveness and greater enforceability of social rights.”).

Historically, the major supranational human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, have avoided social rights enforcement due to limited subject-matter jurisdiction. Yet more recently the Inter-American Court introduced a conceptual breakthrough to assess social rights, which was affirmed by the United Nations Human Rights Committee at the end of 2018. These advances reveal a building, although controversial, movement among supranational tribunals to hold States accountable for ensuring a “dignified life” and various social rights.

In Parts I and II, this article will examine these international legal developments, which primarily involve the integration of social rights into the right to life. In Part III, the article will then assess this expansive right-to-life approach through Gerald Neuman’s useful theoretical lens—considering the approach’s consensual, suprapositive, and institutional aspects. When these three aspects are balanced, a court’s interpretation contributes to making its treaty system “justifiable, politically acceptable, and effective.”³

With its innovative judgments, the Inter-American Court has recognized that the fundamental right to life will never be meaningful and effective without nutrition, water, health care, housing, education, and ancestral lands. By establishing that these elements are indivisible from life, the Court also justified its expansion of remedies to safeguard the lives and dignity of many individuals and communities at risk. While States originally did not draft this right to a dignified life, they have permitted it to develop in the Inter-American System, as it aligns with their emphasis—at least in principle—on human dignity and respectable living conditions. The article concludes that the right to a dignified life, despite certain drawbacks examined, is a sensible approach to protect several intertwined rights, because it reasonably balances consensual, suprapositive, and institutional factors. If the Inter-American Court remains committed to its development, the evolving right to a dignified life will become increasingly protective, as well as progressively influential for both supranational tribunals and national legal institutions.

B. Background

After the Second World War, the adoption of both the American Declaration on the Rights and Duties of Man and the Universal Declaration

³ See Part III, *infra*.

of Human Rights inaugurated a new era for the promotion of human rights.⁴ These founding texts recognized civil and political rights, as well as social, economic and cultural rights, and placed them all on the same plane: “human beings shall enjoy freedom of speech and belief, and freedom from fear and want.”⁵ The various rights were established as universal, equal, and indivisible.

However, in the following years, a world polarized by the Cold War divided these rights between two treaties: the International Covenant on Economic, Social and Cultural Rights⁶ (“ICESCR”), and the International Covenant on Civil and Political Rights⁷ (“ICCPR”).⁸ Nations endorsing a capitalist and market-driven economy dismissed many social rights as mere goals.⁹ The two Covenants themselves set out distinct obligations: while States can “progressively” achieve social rights, civil and political rights must be implemented immediately.¹⁰ In international law, social rights have not yet recovered from this fall from grace.

Still, recent decades have seen the adoption of numerous global and regional treaties that recognize social rights and develop their content. From the United Nations, these include, among others, the Convention on the Rights of the Child,¹¹ the Convention on the Rights of Persons with Disabilities,¹² and the United Nations Declaration on the Rights of

⁴ Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. Doc.OEA/Ser.L.V/II.92, doc. 31 rev. 3 (May 2, 1948); G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). *See generally* LOUIS HENKIN, *THE AGE OF RIGHTS* (1990).

⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Preamble (Dec. 10, 1948).

⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [ICESCR].

⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95–20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [ICCPR].

⁸ *See, e.g.,* Ioana Cismas, *The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES* (Eibe Riedel, Gilles Giacca, and Christophe Golay eds., 2014) (“[W]hile the West may have been responsible for the partition, it was the East that robbed the ICESCR of its expert monitoring and individual communication procedure.”); Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 32, 42 (Louis Henkin ed., 1981) (explaining that “the atmosphere [for treaty negotiation] was poisoned by the political tensions.”).

⁹ *See, e.g.,* SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 217 (2018) (The United States “has consistently rejected economic and social rights.”); Philip Alston, *Putting Economic, Social and Cultural Rights Back on the Agenda of the United States*, in *THE FUTURE OF HUMAN RIGHTS* 122–35 (William F. Schulz ed., 2008) (describing how US administrations have considered social, economic and cultural norms to be “goods” or goals rather than actual rights).

¹⁰ ICESCR, *supra* note 6, art. 2(1).

¹¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹² Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3.

Indigenous Peoples.¹³ Key instruments have also been introduced at the regional level, such as the Charter of Fundamental Rights of the European Union,¹⁴ the Revised European Social Charter,¹⁵ the African Charter on Human and Peoples' Rights,¹⁶ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,¹⁷ and the Inter-American Convention on Protecting the Human Rights of Older Persons.¹⁸

Further, national constitutions around the world have incorporated social rights. Rights to education, trade unions, health care, social security, child welfare, and environmental protection appear in over half of the world's constitutions.¹⁹ In about seventy percent of all constitutions at least one social right is designated as justiciable by national courts, and around one quarter of constitutions recognize ten or more justiciable social rights.²⁰ Tribunals in Colombia, India, Kenya, and South Africa, among others, have issued trailblazing judgments interpreting these rights.²¹

Nevertheless, social rights continue to suffer broad neglect. According to Philip Alston, the "great majority of States" fail to implement social rights effectively, even if they are featured in constitutional texts.²² Legislators often fail to enact these norms into statutes, and many national courts resist interpreting the rights, even when they are recognized by law.²³

¹³ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); 46 I.L.M. 1013 (2007).

¹⁴ Charter of Fundamental Rights of the European Union, *opened for signature* Oct. 2, 2000, 40 I.L.M. 265 (entered into force Dec. 7, 2000).

¹⁵ European Social Charter (revised), May 3, 1996, 163 E.T.S.

¹⁶ African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

¹⁷ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), O.A.S.T.S. No. 69, 28 I.L.M. 156 (Nov. 16, 1999).

¹⁸ Inter-American Convention on Protecting the Human Rights of Older Persons, June 15, 2015, 55 I.L.M. 989 (entered into force Jan. 11, 2017).

¹⁹ Philip Alston (Special Rapporteur on extreme poverty and human rights), *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 33, U.N. Doc. A/HRC/32/31 (Apr. 28, 2016) [hereinafter Report of the Special Rapporteur on Extreme Poverty].

²⁰ *Id.*

²¹ See, e.g., Constitutional Court of Colombia, decision T-025 of 2004, *available in Spanish at* www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm (Colombia); People's Union for Civil Liberties v. Union of India & Others, W.P. No. 196/2001 (India); Ibrahim Sangor Osman and Others v. the Hon. Minister of State for Provincial Administration and Internal Security and Others (2011) K.L.R. (H.C.K.) (Kenya); Government of the Republic of South Africa and Others v. Grootboom, 2001 (1) SA 46 (CC) (S. Afr.).

²² Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 11.

²³ *Id.* ¶ 4.

International adjudication of social rights is even more limited. In 2008, the Optional Protocol to the ICESCR was adopted; this instrument grants the United Nations Committee on Economic, Social and Cultural Rights the competence to decide complaints alleging violations of Covenant rights.²⁴ But, over a decade later, there are only 24 States Parties to the Optional Protocol, and the Committee has issued very few decisions.²⁵ As for Europe, the European Committee of Social Rights interprets the European Social Charter, but only 15 nations have conceded jurisdiction to its complaints mechanism.²⁶ The Inter-American and African²⁷ human rights systems lack comparable bodies that specialize in social rights litigation.²⁸

International human rights advocates also share blame for the second-class status of social rights. For decades, the major human rights organizations emphasized civil and political rights, “turning a blind eye to galloping material inequality.”²⁹ Aryeh Neier—one of the most influential figures in the modern rights movement and founder of Human Rights Watch³⁰—considered social rights to be “dangerous,” because affording

²⁴ G.A. Res. 63/117, annex, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008).

²⁵ For ratification information, see *Status of Ratification Interactive Dashboard*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <http://indicators.ohchr.org> (last visited Dec. 29, 2019).

²⁶ See *Collective Complaints Procedure*, COUNCIL OF EUR., <https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure> (last visited Dec. 29, 2019). Note that, while many Council of Europe States have ratified the European Social Charter or the Revised Social Charter, these treaties permit States to recognize only a portion of the enumerated rights.

²⁷ The African Charter on Human and Peoples’ Rights contains numerous social, economic, and cultural rights that can be interpreted by the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights. Other relevant instruments in the region include the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, as well as the African Charter on the Rights and Welfare of the Child, which has its own monitoring mechanism, the Committee of Experts on the Rights and Welfare of the Child. Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, Org. of African Unity [OAU] AHG/Res. 240 (XXXI), *opened for signature* July 11, 2003 (entered into force Nov. 25, 2005). African Charter on the Rights and Welfare of the Child, Org. of African Unity [OAU] Doc. CAB/LEG/24.9/49, *adopted* July 1, 1990 (entered into force Nov. 29, 1999).

²⁸ Below the Article discusses how the Inter-American Court adjudicates social rights, in addition to civil and political rights.

²⁹ MOYN, *supra* note 9, at 176. See also Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 11 (“This marginality manifests itself . . . in the work of many of the most prominent civil society groups focusing on human rights.”); PAUL FARMER, *PATHOLOGIES OF POWER: HEALTH, HUMAN RIGHTS, AND THE NEW WAR ON THE POOR* 9–10 (2004) (stating that the “hesitation of many in the human rights community” to act on social rights amounts to a “failure . . . to address the urgent needs” of the poor.); Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT’L & COMP. L. REV. 157, 191 (2004) (transitional justice organizations “have often given short shrift to economic, social and cultural rights.”).

³⁰ Aryeh Neier is president emeritus of the Open Society Foundations. He also served as executive director of Human Rights Watch, which he helped found in 1978, and as national executive director of the American Civil Liberties Union.

them the same importance as civil and political rights “takes an area where [political] compromise is essential and brings that into the process of rights adjudication.”³¹

It is true that a new generation of rights advocates and civil society organizations have taken up the mantle of social rights, fusing litigation efforts with political engagement.³² Yet despite this building movement, and the many favorable treaties and constitutions, clearly not enough has been accomplished to protect social rights. In the face of global impoverishment and inequality, Alston calls for concerted, deeper efforts to legally recognize social rights, to establish “appropriate institutional arrangements” for their promotion, and to ensure government accountability when the rights are violated.³³

C. *Approaches of Supranational Tribunals: Life and Social Rights*

1. *The Basics*

The European Court, in operation since 1959, and Inter-American Court, issuing merits decisions since 1987, generally enjoy authority and prestige in their regions.³⁴ Their binding jurisdiction primarily concerns the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁵ and the American Convention on Human Rights,³⁶ respectively. Like the ICCPR, these treaties focus upon civil and political rights, with

³¹ Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1–2 (2006).

³² See, e.g., Elisa Massimino, Letter to the Editor, *This Is the New American Human Rights Movement*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2018/04/29/opinion/human-rights.html> (describing “the new American human rights movement, fueled by activists who understand that enforcement of rights—including economic, social and cultural rights—is an inherently political fight.”); Caroline Bettinger-López, *The Long Arc of Human Rights: A Case for Optimism*, FOREIGN AFFAIRS (May-June 2018). Amnesty International has expanded its efforts to protect social rights. See AMNESTY INT’L, AMNESTY INT’L ANNUAL REPORT 2018/19, <https://www.amnesty.org/en/documents/pol10/6700/2018/en/> (“[T]his year’s report also shines a spotlight on economic, social and cultural rights.”); *Many Rights, Some Wrong*, THE ECONOMIST (Mar. 22, 2007), <https://www.economist.com/international/2007/03/22/many-rights-some-wrong> (Amnesty’s mission has “become broader and more ambitious, calling for . . . economic improvement.”).

³³ Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 21.

³⁴ See, e.g., DAVID HARRIS, MICHAEL O’BOYLE, E.P. BATES, & CARLA BUCKLEY, HARRIS, O’BOYLE & WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 107 (4th ed. 2018) [hereinafter HARRIS, O’BOYLE & WARBRICK]; THOMAS M. ANTKOWIAK & ALEJANDRA GONZA, THE AMERICAN CONVENTION ON HUMAN RIGHTS: ESSENTIAL RIGHTS (2017) [hereinafter ANTKOWIAK & GONZA].

³⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

³⁶ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter American Convention].

select exceptions.³⁷ For its part, the United Nations Human Rights Committee delivers non-binding, yet influential, interpretations of the ICCPR through general comments, observations on state reports, and decisions in individual cases.³⁸

The African Court on Human and Peoples’ Rights, the newest regional human rights tribunal, did not hand down its first judgment until the end of 2009.³⁹ The African Court mainly interprets the African Charter on Human and Peoples’ Rights, which, in addition to civil and political rights, recognizes individual rights to work, health, education, and cultural life.⁴⁰ The African Charter also establishes collective rights, including peoples’ rights to self-determination, to “economic, social and cultural development,” and to “freely dispose of their wealth and natural resources.”⁴¹

2. The United Nations Human Rights Committee

Since 1982, the Human Rights Committee has stated that the right to life “cannot properly be understood in a restrictive manner.”⁴² Mainly in its

³⁷ For example, the ICCPR’s provisions on self-determination, freedom of thought, freedom of association, and minority rights also refer to social, economic and cultural rights. See Martin Scheinin, *Human Rights Committee: Not Only a Committee on Civil and Political Rights*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 540 (Malcolm Langford ed., 2008); Craig Scott, *Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOODE HALL L. J. 769, 771 (1989) (considering the extent to which rights in the ICESCR “permeate” the ICCPR). Further, the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms added the right to education to the European Convention, among other rights. See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 264 (entered into force May 18, 1954).

³⁸ See, e.g., MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY xxvii, 894 (2d ed., 2005) (noting that the Human Rights Committee’s decisions and resolutions are authoritative but not binding under international law).

³⁹ The African Court on Human and Peoples’ Rights was established by a protocol to the African Charter on Human and Peoples’ Rights. Organization of African Unity (OAU), *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights* (entered into force Jan. 25, 2004), available at <https://www.refworld.org/docid/3f4b19c14.html>. Though the Protocol entered into force in 2004, little progress was made, and the first judgment was not issued until 2009. *Yogogombaye v. Republic of Senegal*, Judgment, App. No. 001/2008, Afr. Comm’n H.P.R. (Dec. 15, 2009), available at <http://www1.umn.edu/humanrts/africa/comcases/1-2008.pdf>.

⁴⁰ African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217, arts. 15–17 (Oct. 21, 1986), <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

⁴¹ *Id.* arts. 20–22.

⁴² U.N. Human Rights Comm., General Comment No. 6: Article 6 (Right to Life), ¶ 5 (Apr. 30, 1982), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), 176–78 (May 27, 2008) [hereinafter General Comment 6]; see also U.N. Human Rights Comm., Communication No. 2348/2014, *Toussaint v. Canada*, ¶ 11.3 (views adopted on 24 July 2018) [hereinafter *Toussaint v. Canada*].

responses to the reports of State Parties, the Committee has interpreted the ICCPR's Article 6, the right to life, to include select socio-economic elements.⁴³ In this way, it has directed States to "take positive measures required by [A]rticle 6 to address [the] serious problem" of homelessness.⁴⁴ The Committee has called on States to provide all detained individuals with necessary medical care and to regularly monitor detention conditions.⁴⁵ It has urged States "to eliminate malnutrition" and the spread of disease.⁴⁶ In addition, the Committee has observed that measures which restrict "access to all basic and life-saving services such as food, health, electricity, water and sanitation" jeopardize Article 6.⁴⁷

In an individual case, *Toussaint v. Canada*, the Committee recently held that State obligations to respect and ensure the right to life include "reasonably foreseeable threats and life-threatening situations that can result in loss of life."⁴⁸ That is, States can violate Article 6 even if these scenarios do not lead to death. Further,

as a minimum States [P]arties have the obligation to provide access to existing health care services that are reasonably available and

⁴³ To protect social rights, the Human Rights Committee has used other ICCPR provisions as well, such as the prohibition on torture and the right to privacy, family and home. *See* Scheinin, *supra* note 37, at 540.

⁴⁴ U.N. Human Rights Comm., Concluding Observations of the H.R. Comm., Canada, ¶ 12, U.N. Doc. CCPR/C/79/Add.105 (Apr. 7 1999).

⁴⁵ Communication No. 763/1997, *Lantsov v. Russian Federation*, ¶¶ 9.2–11 (views adopted on 26 March 2002); General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 25 [hereinafter General Comment 36]. *See also* *Womah Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, ¶ 9.3 (1994) (setting out minimum standards for detention conditions).

⁴⁶ General Comment 6, *supra* note 42, ¶ 5. *See also* U.N. Human Rights Comm., Concluding Observations of the H.R. Comm., Democratic People's Republic of Korea, ¶ 12, U.N. Doc. CCPR/CO/72/PRK (Aug. 27, 2001) ("[T]he Committee remains seriously concerned about the lack of measures by the State party to deal with the food and nutrition situation."); U.N. Human Rights Comm., Concluding Observations of the H.R. Comm., Moldova, ¶ 9, U.N. Doc. CCPR/CO/75/MDA (July 25, 2002) ("The State Party should take immediate steps to ensure that the conditions of detention within its facilities comply with the standards set out in articles 6, 7 and 10 of the Covenant, including the prevention of the spread of disease and the provision of appropriate medical treatment to persons who have contracted diseases, either in prison or prior to their detention.").

⁴⁷ U.N. Human Rights Comm., Concluding Observations on the fourth periodic report of Israel, ¶ 12, U.N. Doc. CCPR/C/ISR/CO/4 (Nov. 21, 2014) (noting with concern that "the blockade [of the Gaza Strip] continues to . . . negatively impact [] Palestinians' access to all basic and life-saving services such as food, health, electricity, water and sanitation."). *See also* U.N. Human Rights Comm., Concluding Observations of the Human Rights Comm., Israel, ¶ 18, U.N. Doc. CCPR/C/ISR/CO/3 (Sept. 3, 2010) ("The Committee is concerned at water shortages disproportionately affecting the Palestinian population of the West Bank, due to prevention of construction and maintenance of water and sanitation infrastructure."). The Human Rights Committee has also used interim measures to seek reconnection of water sources. U.N. Human Rights Comm., *Liliana Assenova Naidenova v. Bulgaria*, ¶ 10, U.N. Doc. CCPR/C/106/D/2073/2011 (Nov. 27, 2012).

⁴⁸ *Toussaint v. Canada*, *supra* note 42.

accessible, when lack of access to the health care would expose a person to a reasonably foreseeable risk [of death].⁴⁹

However, this decision was uncommon.⁵⁰ The Committee rarely has developed the socio-cultural content of the right to life through its individual communications procedure.⁵¹

In October of 2018, building on *Toussaint*, the Committee expanded the boundaries of the right to life. Following three years of consultations and drafting,⁵² the Committee approved General Comment No. 36 on the right to life.⁵³ It stated, in part:

The duty to protect life implies that States [P]arties should take appropriate measures to address the general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their *right to life with dignity*. These general conditions may include high levels of criminal and gun violence, . . . pervasive traffic and industrial accidents, . . . degradation of the environment, . . . deprivation of land, territories and resources of indigenous peoples, . . . the prevalence of life threatening diseases, . . . extensive substance abuse, widespread hunger and malnutrition and extreme poverty and homelessness (emphasis added).⁵⁴

The General Comment then explained that States should address these “general conditions” through “measures designed to ensure access without

⁴⁹ *Id.*

⁵⁰ See U.N. Human Rights Comm., *Cabal and Pasini v. Australia*, ¶ 7.7, U.N. Doc. CCPR/C/78/D/1020/2001 (Aug. 7 2003) (“The Committee considers that a failure to separate detainees with communicable diseases from other detainees could raise issues primarily under articles 6, paragraph 1, and 10, paragraph 1.”).

⁵¹ See U.N. Human Rights Comm., Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, ¶ 33, U.N. Doc. A/71/310 (Aug. 8, 2016) (“The Committee’s recognition in its general comment No. 6 and in periodic reviews that the right to life requires positive measures to address homelessness and poverty stands in marked contrast with the absence of consideration of these obligations in [individual communications].”) [hereinafter Report of the Special Rapporteur on Adequate Housing]; Eibe Riedel, *The Right to Life and the Right to Health, in Particular the Obligation to Reduce Child Mortality*, in THE RIGHT TO LIFE 351, 354–55 (Christian Tomuschat, Evelyne Lagrange & Stefan Oeter eds., 2010) (explaining that the Committee hardly ever deals with “broader” right-to-life issues and positive state obligations in its individual cases).

⁵² During the drafting process, numerous States, experts, United Nations institutions, and civil society organizations submitted observations. See *Call for Comments on Article 6—Right to Life*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> (last visited Nov. 11, 2019).

⁵³ General Comment 36, *supra* note 45. This comment replaced the earlier general comments No. 6 and No. 14, adopted by the Committee in 1982 and 1984, respectively. *Id.* ¶ 1.

⁵⁴ *Id.* ¶ 26.

delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation,” as well as “effective emergency health services, emergency response operations . . . and social housing programs,” among others.⁵⁵ Thus, the Human Rights Committee has extended State obligations and the substantive content for the right to life, “underscoring” the “right to life with dignity.”⁵⁶

The international legal precedent for this right, also known as the “right to a dignified life,” is the seminal judgment *Villagrán Morales v. Guatemala* from the Inter-American Court of Human Rights.⁵⁷ With the *Villagrán Morales* line of cases, the Inter-American Court expands the right to life (Article 4 of the American Convention) to include certain social, economic, and cultural rights. As discussed in detail below, the Court has found Article 4 violations when individuals or communities lacked adequate water, nutrition, health care, shelter, or education.

3. The European Court of Human Rights

In contrast, the European Court has resisted the expansion of the right to life in this way. In fact, the Court has held that “neither Article 2 [the right to life] nor any other provision of the [European] Convention can be interpreted as conferring on an individual a right to enjoy any given standard of living, or a right to obtain financial assistance from the State.”⁵⁸ There is scant case law on whether a State’s failure to provide housing may implicate Article 2.⁵⁹

Similarly, the European Court has avoided establishing a general right of access to health care under Article 2, even when life is at risk.⁶⁰ The Grand Chamber has held that “issues such as the allocation of public funds in the

⁵⁵ *Id.*

⁵⁶ Human Rights Committee, Human Rights Committee adopts General Comment on the right to life (Oct. 30, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23797&LangID=E> (“The General Comment sent a strong message against the narrow legal interpretation of the right to life . . . and it underscored the right to life with dignity.”). *See also* Report of the Special Rapporteur on Adequate Housing, *supra* note 51, ¶ 44 (stating that certain components, such as “the right to a dignified life,” could “lay the foundation for a renewed commitment to a more expansive approach and the recognition of positive obligations.”). Interestingly, a few months earlier the Human Rights Committee mentioned “a life with dignity” without expressly naming it a right. *Toussaint v. Canada*, *supra* note 42.

⁵⁷ *Villagrán Morales v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 191 (Nov. 19, 1999).

⁵⁸ *Wasilewski v. Poland*, App. No. 32734/96, Admissibility, Eur. Ct. H.R., ¶ 3 (1999), <http://hudoc.echr.coe.int/eng?i=001-59101>. Nevertheless, in *Kutepov and Anikeyenko v. Russia*, the Court left open the possibility that an inadequate pension, if leading to a “real and immediate risk” to an individual’s life, could “warrant the application of Article 2.” *Kutepov and Anikeyenko v. Russia*, App. No. 68029/01, Judgment, Eur. Ct. H.R., ¶ 62 (2005), <http://hudoc.echr.coe.int/eng?i=001-70761>.

⁵⁹ *See* HARRIS, O’BOYLE & WARBRICK, *supra* note 34, at 216.

⁶⁰ *See id.* at 215.

area of healthcare are not a matter [for the Court],” choosing to defer to the competent national authorities.⁶¹ Nevertheless, as established in other human rights systems, given the vulnerable situation of individuals in State custody, the State has direct responsibility for their “health and physical well-being,” and must provide them “with the requisite medical assistance.”⁶²

Further, the European Court requires States to regulate both public and private hospitals in order to protect the lives of patients.⁶³ However, it has explained that only in “very exceptional circumstances” will health professionals’ acts and omissions lead to a violation of Article 2.⁶⁴ These circumstances include when a patient’s life “is knowingly put in danger by denial of access to life-saving emergency treatment.”⁶⁵ Article 2 will also be breached where “a systemic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment, and the authorities knew or ought to have known about that risk” and failed to prevent it.⁶⁶ Thus, the bar to an Article 2 violation in this context is high; yet denial of medical treatment is one of the few situations⁶⁷ where the Court finds social rights to implicate the right to life.⁶⁸

⁶¹ Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, Judgement, Eur. Ct. H.R., ¶ 175 (2017), <http://hudoc.echr.coe.int/eng?i=001-179556>.

⁶² Gorelov v. Russia, App. No. 49072/11, Judgement, Eur. Ct. H.R., ¶ 42 (2014), <http://hudoc.echr.coe.int/eng?i=001-139931>. See also Slimani v. France, No. 57671/00, 2004-IX (extracts) Eur. Ct. H.R. ¶ 27, <http://hudoc.echr.coe.int/eng?i=001-61944>.

⁶³ Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, Judgement, Eur. Ct. H.R., ¶ 166. See also Oyal v. Turkey, App. No. 4864/05, Judgement, Eur. Ct. H.R., ¶ 54 (2010), <http://hudoc.echr.coe.int/eng?i=001-97848>.

⁶⁴ Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, Judgement, Eur. Ct. H.R., ¶ 190.

⁶⁵ *Id.* ¶ 191. The European Court notes that the situation “does not extend to circumstances where a patient is considered to have received deficient, incorrect or delayed treatment.” *Id.* A refusal to release a sick prisoner that results in a reduction of his or her life expectancy may raise an issue under Article 2. Grice v. United Kingdom, App. No. 22564/93, Judgement, Eur. Ct. H.R. (1994).

⁶⁶ Lopes de Sousa Fernandes v. Portugal, App. No. 56080/13, Judgement, Eur. Ct. H.R., ¶ 192. For example, in *Asiye Genç v. Turkey*, a prematurely-born baby died in an ambulance while being transferred from one hospital to another. The Court concluded that the State had breached Article 2 for failing to adequately provide for and coordinate emergency care and neonatal facilities in the area’s hospitals. *Asiye Genç v. Turkey*, App. No. 24109/07, Judgement, Eur. Ct. H.R., ¶ 87 (2015), <http://hudoc.echr.coe.int/eng?i=001-151025>. In *Nencheva and Others v. Bulgaria*, 15 young persons died during the winter in their state-run facility for disabled youth, because authorities did not furnish sufficient medical care, food, and heat. The Court found the State responsible for violating Article 2, due to “exceptional circumstances” that took the case beyond a health professional’s mere “error of judgment.” The judgment is not available in English; for a summary, see HARRIS, O’BOYLE & WARBRICK, *supra* note 34, at 215.

⁶⁷ See Liam Thornton, *The European Convention on Human Rights: A Socio-Economic Rights Charter?*, in IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: 60 YEARS AND BEYOND 233 (Egan, Thornton, and Walsh eds., 2014) (explaining that most of the relevant cases under Article 2 are “within the field of access to medical treatment.”).

⁶⁸ In *Öneryildiz v Turkey*, several victims died when a methane gas explosion occurred in the garbage dump where they lived, resulting in an Article 2 violation. *Öneryildiz v Turkey*, Grand Chamber, App.

4. *The African Court on Human and Peoples' Rights*

In its 2017 judgment concerning the Ogiek community of Kenya, the African Court directly considered the right to a “decent” or dignified life.⁶⁹ The Ogiek population had been evicted from their ancestral lands in the Mau Forest, and the Court found that Kenya had violated, among others, their collective rights to property and to “economic, social and cultural development.”⁷⁰ The community members also argued that their right to life had been infringed, as they were “exposed to conditions affecting their decent way of life.”⁷¹ The Court responded that “the sole fact of eviction and deprivation of economic, social and cultural rights may not necessarily result in the violation of the right to life” under the African Charter.⁷²

In this way, the African Court has appeared to reject a broader interpretation of the right to life, explaining that the African Charter’s Article 4 “relates to the physical rather than the existential understanding of the right to life.”⁷³ The African Court certainly could have accepted a wider concept of the right. As the Ogiek judgment itself recognized, the African Charter sets out an expansive formulation for the right, linking the right to life to “the inviolable nature and integrity of the human being.”⁷⁴ Moreover, in similar

No. 48939/99, Judgement, Eur. Ct. H.R. (2004). In view of this judgment, O’Cinneide argues that it would involve “no great conceptual leap to suggest that state responsibility may be engaged where individuals are exposed to specific and distinct threats to their life as a result of their destitution . . . , where the nature and existence of that distinct threat to life should have been known to the authorities” and reasonable measures could have been taken to prevent the threat. Colm O’Cinneide, *A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights*, 5 EUR. HUM. RTS. L. REV. 583, 583–605 (2008). See also ELIZABETH WICKS, THE RIGHT TO LIFE AND CONFLICTING INTERESTS 219 (2010) (“While [*Öneryildiz v Turkey*] falls short of imposing a general obligation on state parties to the ECHR to protect or guarantee the lives of the poor, it does imply that a specific responsibility may emerge in particular circumstances to protect the destitute from perceptible threats to their lives.”).

⁶⁹ African Commission on Human and Peoples’ Rights v. Republic of Kenya, Judgement, 006/2012, Afr. Comm’n H.P.R., ¶ 153 (May 26, 2017), <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>.

⁷⁰ *Id.* ¶ 210.

⁷¹ *Id.* ¶ 147.

⁷² *Id.* ¶ 153. See also Ricarda Roesch, *The Ogiek Case of the African Court on Human and Peoples’ Rights: Not So Much News After All?*, EJIL: TALK! (June 16, 2017), <https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all/> (“The Ogiek case shows that the causality between the eviction of a group and a violation of their right to life can be difficult to establish.”).

⁷³ African Commission on Human and Peoples’ Rights v. Republic of Kenya, 006/2012, Afr. Comm’n H.P.R., ¶ 154.

⁷⁴ *Id.* ¶ 152 (“Contrary to other human rights instruments, the Charter establishes the link between the right to life and the inviolable nature and integrity of the human being. The Court finds that this formulation reflects the indispensable correlation between these two rights.”).

circumstances, the African Commission on Human and Peoples’ Rights has cited the Inter-American Court’s “right to a dignified life” with approval.⁷⁵

5. Section Synthesis

To some extent, then, the Human Rights Committee has adopted the Inter-American Court’s concept of the right to a dignified life.⁷⁶ Of course, it remains to be seen how the Committee further refines and applies this interpretation to the ICCPR States Parties.⁷⁷ Particularly interesting will be how the Committee determines precise obligations and entitlements under the right to life through the individual communications procedure.⁷⁸

In contrast, the African Court seems to have disapproved of this broader right to life. However, endorsing this principle was less necessary for social rights protection in the African regional system, as the African Charter already establishes several social, economic, and cultural rights—of both individual and collective nature. For its part, the European Court has also shown much caution in integrating social rights into the right to life. Nevertheless, there are promising signs that the Court increasingly

⁷⁵ See, e.g., Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya, Comm. No. 276/2003, Afr. Comm’n H.P.R., ¶ 217, (Feb. 4, 2010) (“The IActHR held that one of the obligations that the State must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person In this regard, the State has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.”), https://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf; General Comment No.3 on the African Charter on Human and Peoples’ Rights on the right to life (Article 4), Afr. Comm’n H.P.R., ¶ 3 (Nov. 2015) (“[T]he Charter envisages the protection not only of life in a narrow sense, but of dignified life. This requires a broad interpretation of States’ responsibilities to protect life”).

⁷⁶ As closely reviewed below, to date the Inter-American Court has indicated that water, nutrition, healthcare, housing, education, and ancestral lands all form part of a dignified life.

⁷⁷ As noted earlier, the Human Rights Committee’s work was previously criticized because “the focus of periodic reviews and communications related to article 6 [was] on state action that interferes with the right to life rather than state inaction in the face of systemic deprivations of the right.” ESCR-Net, *Recognizing the Interdependence and Indivisibility of the Right to Life with ESC Rights: Written Submissions for the General Discussion on the Preparation for a General Comment on Article 6 (Right to Life)* (June 12, 2015), https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/CCPR/Discussion/2015/ESCR_Net_SRAC_GI.doc&action=default&DefaultItemOpen=1.

⁷⁸ It is important to point out that language was ultimately removed from the draft General Comment that may have restricted individual petitions before the Human Rights Committee (or national courts interpreting the provision). The deleted text provided: “Individuals claiming to be victims of a violation of the Covenant [for the purposes of article 1 of Optional Protocols] must show, however, that their rights were directly violated by acts or omissions attributable to the States [P]arties [to the Optional Protocol], or are under a real and personalized risk of being violated.” A11 Initiative for Economic and Social Rights, *Advocating for the Amendment of Paragraph 15 of the Human Rights Committee Draft General Comment 36*, <http://www.a11initiative.org/en/advocating-for-the-amendment-of-paragraph-15-of-the-human-rights-committee-draft-general-comment-36/> (last visited Nov 20, 2019).

recognizes the interdependent relationship between social and civil rights.⁷⁹ While rare with the right to life, the European Court has more frequently protected socio-economic norms under the rights to humane treatment and private life.⁸⁰

II. THE INTER-AMERICAN COURT AND SOCIAL RIGHTS

A. Overview

The Inter-American Court has protected and promoted social, economic, and cultural rights by distinct means.⁸¹ First, the Tribunal has recognized such rights as essential elements of the American Convention's Article 4, right to life.⁸² Second, it has recently introduced a bold interpretation of the Convention's Article 26, "Progressive Development," to find independent violations of several social rights.⁸³ Third, the Court has used Article 21, right to property, to safeguard not only indigenous lands and resources, but also their cultural identity.⁸⁴ Fourth, it previously utilized due

⁷⁹ See Liam Thornton, *The European Convention on Human Rights: A Socio-Economic Rights Charter?*, in IRELAND AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: 60 YEARS AND BEYOND, *supra* note 67, at 227–56; Luke Clements and Alan Simmons, *European Court of Human Rights: Sympathetic Unease*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW, *supra* note 37, at 409–27.

⁸⁰ Violations to the European Convention's Article 3 (Prohibition of Torture) often occur under circumstances of serious deprivation, such as unacceptable detention conditions. See HARRIS, O'BOYLE & WARBRICK, *supra* note 34, at 261. See also *Larioshina v. Russia*, App. No. 56869/00, Judgement, Eur. Ct. H.R. (2002), ¶ 3 ("[T]he Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention."). In cases involving the destruction of homes and destitute living conditions, the Court has found violations to Article 8 (Right to Respect for Private and Family Life). See generally *Dulas v. Turkey*, App. No. 25801/94, Judgement, Eur. Ct. H.R. (2001); *Moldovan and Others v. Romania*, App. Nos. 41138/98 and 64320/01, Eur. Ct. H.R. (2005).

⁸¹ See generally JAMES L. CAVALLARO, CLARET VARGAS, CLARA SANDOVAL, BERNARD DUHAIME, CAROLINE BETTINGER-LÓPEZ, STEPHANIE ERIN BREWER, DIANA GUZMÁN, AND CECILIA NADDEO, DOCTRINE, PRACTICE AND ADVOCACY IN THE INTER-AMERICAN SYSTEM (2019); Tara Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW, *supra* note 37, at 372–408; Mónica Ferial-Tinta, *Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions*, 29 HUMAN RIGHTS Q. 431, 431–459 (2007).

⁸² See *infra* Sections B and C; Steven R. Keener & Javier Vasquez, *A Life Worth Living: Enforcement of the Right to Health through the Right to Life in the Inter-American Court of Human Rights*, 40 COLUM. HUM. RTS. L. REV. 595 (2009); Jo M. Pasqualucci, *The Right to a Dignified Life (Vida Digna): The Integration of Economic and Social Rights with Civil and Political Rights in the Inter-American Human Rights System*, 31 HASTINGS INT'L & COMP. L. REV. 1 (2008).

⁸³ See *infra* Section D.

⁸⁴ See, e.g., *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 341(2) (June 27, 2012) (finding "the violation of the rights to consultation, to indigenous communal property, and to cultural identity, in the terms of Article 21 of the American Convention"); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and

process and procedural guarantees to protect the rights to a pension and social security.⁸⁵ Finally, the Court has ordered expansive socio-cultural reparations, including housing, health, agricultural, cultural, and educational programs.⁸⁶ This section focuses on the Court’s influential right-to-life approach, with additional discussion of its new and disputed method of interpreting Article 26.

B. *The Right to Vida Digna*

The Court’s right to *vida digna*, often translated as the right to a “dignified existence,” or to a “dignified” or “decent” life, is primarily grounded in the Convention’s Article 4.⁸⁷ The Tribunal introduced this right in 1999, through its pioneering judgment *Villagrán Morales v. Guatemala*; it has further refined the right in subsequent decisions.⁸⁸

Villagrán Morales involved the murder of five teenagers by Guatemalan national police. At the time, there was a brutal crackdown against “street children” who were perceived to threaten public safety.⁸⁹ The Court held that the “fundamental” right to life also includes the “right that [a human being] will not be prevented from having access to the conditions that guarantee a dignified existence.”⁹⁰ The Court also asserted that States should

Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007) (linking Article 21 to the many rights associated with an indigenous community’s ability “to freely determine and enjoy [its] own social, cultural and economic development.”).

⁸⁵ See Melish, *supra* note 81, at 398. Furthermore, while the American Convention does not mention unions expressly—unlike the Protocol of San Salvador, the ICCPR, and the European Convention—the Court has established the right to form trade unions through the Convention’s Article 16, Freedom of Association. *Huilca Tecse v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 70 (Mar. 3, 2005).

⁸⁶ For example, the Court has required restitution and clean-up of ancestral lands, and extensive community development initiatives, including educational, housing, agricultural and health projects. See, e.g., *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 293–95; *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 201; *Plan de Sánchez Massacre v. Guatemala*, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 116, ¶¶ 106–08 (Nov. 19, 2004) (mandating broad medical, psychological and vocational programs); *Juvenile Reeducation Institute v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 318–321 (Sept. 2, 2004); *Río Negro Massacres v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 285 (Sept. 4, 2012) (ordering an initiative “for the rescue, promotion, dissemination and conservation of the ancestral customs and practices” of the Maya Achí people).

⁸⁷ Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (providing that “[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”). But see *Juvenile Reeducation Institute v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 190 (finding a breach of both Article 4 and Article 5).

⁸⁸ See *Villagrán Morales v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 191.

⁸⁹ *Id.* ¶ 79.

⁹⁰ *Id.* ¶ 144.

provide “at-risk children” with the “minimum conditions for a dignified life,” because “every child has the right to harbor a project of life that should be tended and encouraged by the public authorities” so that both the child and society may benefit.⁹¹

In this way, the Court expanded positive State obligations to protect life, when the “security and integrity” of youth are under threat.⁹² Later, *Mapiripán Massacre v. Colombia* condemned the “climate of violence and insecurity” endured by children in the aftermath of a savage attack on their community.⁹³ Threats, homelessness, separation from family, and poverty all ensued—depriving the youth of the “right to a decent life.”⁹⁴ As a result, the Court found that the rights to life of surviving children, as well as two youth killed in the massacre, were violated.⁹⁵ For similar reasons, the Court found that displaced adult survivors also suffered a violation of the “right to a decent life.”⁹⁶

Gonzales Lluy v. Ecuador concerned a child, Talía Gonzales Lluy, who was mistakenly given a transfusion with HIV-infected blood.⁹⁷ The Inter-American Commission argued that Talía’s right to a dignified life, among other rights, had been violated by the State’s failure both to regulate the Red Cross blood bank and to ensure Talía’s medical treatment once her family filed a criminal complaint.⁹⁸ Talía survived the ordeal, and ultimately the Court found that the State violated her rights to life and to personal integrity, “owing to the violation of the obligation to monitor and supervise the provision of health care services.”⁹⁹ The Court did not specifically find a breach of Talía’s right to a dignified life, although the judgment recognized

⁹¹ *Id.* ¶ 191. *See also* Juridical Condition & Human Rights of the Child, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 137(7) (Aug. 28, 2002) (stressing for children “the [State] obligation to provide the measures required for life to develop under decent conditions.”).

⁹² *See generally* Villagrán Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 24 (Trindade, A.A.C., concurring).

⁹³ “Mapiripán Massacre” v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 162 (Sept. 15, 2005).

⁹⁴ *Id.* ¶¶ 161–62.

⁹⁵ *Id.* ¶ 163.

⁹⁶ *Id.* ¶ 186.

⁹⁷ *See generally* *Gonzales Lluy v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 298 (Sept. 1, 2015).

⁹⁸ *Id.* ¶ 1. The Inter-American Commission, among other responsibilities, refers cases to the Court; while its role has been reduced since 2009, it must appear in all cases before the Tribunal. *See generally* Organization of American States, American Convention on Human Rights art. 57, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁹⁹ *Gonzales Lluy v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶ 191.

that her family was forced to go to great lengths “to ensure Talía’s survival” and to provide “a decent life for her.”¹⁰⁰

Juvenile Reeducation Institute involved thousands of detained teenagers and young adults who faced appalling living conditions.¹⁰¹ The Court held that States have the duty to ensure that all incarcerated persons, both children and adults, can still enjoy a *vida digna*.¹⁰² Detention facilities must allow for “opportunities for exercise or recreation,” education, and “prompt and proper medical, dental and psychological care.”¹⁰³ However, the detainees in *Juvenile Reeducation Institute* were overcrowded, lacked medical attention and educational programs, and endured riots and deadly fires. Consequently, the Court found Paraguay in breach of both Articles 4 and 5 (right to personal integrity) with respect to *all* detainees at the facility over a five-year period—amounting to over three thousand individuals.¹⁰⁴

In *Chinchilla Sandoval v. Guatemala*, the Court also linked the rights to life and personal integrity when assessing detention conditions.¹⁰⁵ María Inés Chinchilla Sandoval, an adult, suffered from serious health problems; however, she received inadequate medical attention while incarcerated and eventually died in prison. The Court affirmed that the rights to life and personal integrity are “directly and immediately linked” to health care.¹⁰⁶ Further, the Court emphasized that detained persons cannot, on their own, obtain “a series of basic necessities essential for the development of a dignified life.”¹⁰⁷ The State must ensure that detention conditions are

¹⁰⁰ *Id.* ¶ 216, 290 (noting that “the situation of poverty also had an impact on the difficulties to gain access to the education system” and on the victim’s ability to overcome her “numerous factors of vulnerability and risk.”).

¹⁰¹ *Juvenile Reeducation Institute v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 4.

¹⁰² For example, the judgment stated “the Court must establish whether the State, in fulfillment of its role of guarantor, took measures to ensure to all inmates at the Center—adults and children alike—the right to live with dignity and thus help them build their life plan, even while incarcerated.” *Id.* ¶ 164. The Court requires additional protections for detained children. *Id.* ¶ 176.

¹⁰³ *Id.* ¶ 166.

¹⁰⁴ The Court found additional Article 4 violations in the cases of individuals who had died in detention for various reasons attributed to the State; additional Article 5 violations were declared in the cases of victims who had been injured while in detention for causes attributed to Paraguay. *Id.* ¶ 190.

¹⁰⁵ *Chinchilla Sandoval v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 312 (Feb. 29, 2016): *See also* Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 114 (Nov. 15, 2017) (joining the right to life, in particular *vida digna*, with the right to personal integrity); *Juvenile Reeducation Institute v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 170–71.

¹⁰⁶ *Chinchilla Sandoval v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 312, ¶ 170.

¹⁰⁷ *Id.* ¶ 168. *See also* *Mendoza v. Argentina*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 260, ¶ 188 (May 14, 2013); Inter-Am. Comm’n H.R., Report on the Human Rights of Persons Deprived of Liberty in the Americas, OEA/Ser. L/V/II Doc. 64, ¶ 49 (Dec. 31, 2011), <http://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>.

“compatible with personal dignity.”¹⁰⁸ Specifically, it must safeguard the physical and mental health of incarcerated persons, through “regular medical checkups, and when required, medical treatment that is adequate, timely and, if applicable, specialized and appropriate to [their] special necessities.”¹⁰⁹ The Court ultimately concluded that Guatemala violated Articles 4 and 5 with respect to Ms. Chinchilla Sandoval.

In *Yakye Axa Community v. Paraguay*, the Court first applied its concept of *vida digna* to indigenous populations.¹¹⁰ The Yakye Axa community suffered twelve years of delays while it attempted to reclaim traditional lands through administrative procedures. In the meantime, the community lived in a temporary settlement adjacent to their ancestral territories; however, they were unable to practice their traditional subsistence activities.¹¹¹ The housing, sanitation, and health conditions were gravely deficient.¹¹²

The Court stressed that a State holds the “duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.”¹¹³ Further, it considered elements of a dignified life in this context:

Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity.¹¹⁴

In view of the community’s abysmal living conditions and fruitless efforts by Paraguay to alleviate them, the Court found the State responsible for a violation of the right to *vida digna* and Article 4 of the Convention.¹¹⁵

Xákmok Kásek Indigenous Community involved another displaced indigenous community in Paraguay.¹¹⁶ The petitioners, a nomadic people,

¹⁰⁸ Chinchilla Sandoval v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 312, ¶ 169.

¹⁰⁹ *Id.* ¶ 171. Subsequently, the Court offers additional, detailed instructions on medical care. *See id.* ¶¶ 171–225.

¹¹⁰ Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 2, (June 17, 2005).

¹¹¹ *Id.* ¶ 164.

¹¹² *Id.*

¹¹³ *Id.* ¶ 162.

¹¹⁴ *Id.* ¶ 167.

¹¹⁵ *Id.* ¶ 176.

¹¹⁶ Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 2, (Aug. 24, 2010). *Sawhoyamaya Indigenous Community v. Paraguay* also concerned an indigenous community that sought to reclaim its lands while suffering harrowing living conditions. *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment,

claimed over 40 square miles of the Paraguayan Chaco.¹¹⁷ Under a heading titled “The Right to a Dignified Existence,” the judgment assessed, in more detail than usual, the following aspects of the community’s situation: “access to and quality of water,” “diet,” “health,” and “education.”¹¹⁸

As for water access, the Court noted that the water occasionally supplied by local authorities was far less than the minimum of 7.5 liters per day per person required by international standards.¹¹⁹ Regarding nutrition, local ranches had restricted the community’s farming and hunting. Although the State delivered shipments of food, the Court found these deliveries to be too infrequent.¹²⁰ The judgment took note of evidence demonstrating alarming levels of malnourishment among community members.¹²¹

As for health care, the State sent personnel to provide medical treatment and medicine on several occasions. Nevertheless, the Court considered the medical care to be “temporary and transitory.”¹²² It also observed that hospitals and clinics were located far away, “basic medications” were not available on site, and Paraguay needed to implement services that respected the community’s traditions and customs.¹²³ With respect to education for the Xákmok Kásek, the Court affirmed that States must “guarantee accessibility and sustainability to free basic education,” and emphasized the use of culturally-appropriate methods “in the heart of indigenous communities.”¹²⁴ The judgment found that the community’s school lacked sufficient resources, and did not offer appropriate shelter from the elements.¹²⁵

After its assessment, the Court concluded that Paraguay did not furnish “the basic services to protect the right to a decent life of a specific group of individuals in these conditions of special, real and immediate risk.”¹²⁶ As a result, like in *Yakye Axa*, Article 4 was breached with respect to “all the

Inter-Am. Ct. H.R. (ser. C) No. 146., ¶ 208. In *Sawhoyamaza*, the Court held the State responsible for nineteen deaths; however, unaccountably, *Sawhoyamaza* did not appear to find a violation of the community’s right to *vida digna*.

¹¹⁷ Xákmok Kásek Indigenous Cmty. v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 68.

¹¹⁸ *Id.* ¶¶ 193–213.

¹¹⁹ *Id.* ¶ 195 (citing documents from the United Nations Committee on Economic, Social, and Cultural Rights and the World Health Organization). Little information was available about the water’s quality.

¹²⁰ *Id.* ¶ 200. Based on the information provided to the Court, it concluded that the State supplied “approximately 0.29 kg per person per day” of food from 2009 to 2010, but the judgment does not explain precisely how the Court determined that amount was insufficient. *Id.*

¹²¹ *Id.* ¶ 201.

¹²² *Id.* ¶ 208.

¹²³ *Id.* ¶¶ 207–08.

¹²⁴ *Id.* ¶ 211.

¹²⁵ *Id.* ¶ 213.

¹²⁶ *Id.* ¶¶ 217.

members” of the Xákmok Kásek Community.¹²⁷ Further, the Court found an additional Article 4 violation for thirteen deaths, which were traced to the precarious health conditions.¹²⁸ The State did not adopt the necessary measures “within its powers, that could reasonably be expected to prevent or to avoid the risk to the right to life.”¹²⁹

At the end of 2017, the Court returned to the topic of dignified life with its *Advisory Opinion 23*, which analyzed State obligations for protecting the environment under the American Convention.¹³⁰ As for the right to *vida digna*, the advisory opinion primarily focused on the situation of indigenous and tribal populations, and how States must adopt positive measures to ensure their “access to a dignified life—which includes the protection of their close relationship with the land—and to their life project, in both its individual and collective dimension.”¹³¹ The Court underlined the importance of “access to, and the quality of, water, food and health” for a dignified life, explaining that these components are also key for the exercise of other rights.¹³² It stressed that the protection of the environment is a “condition” for a dignified life; in this way, pollution and development projects can jeopardize *vida digna*.¹³³

Advisory Opinion 23 was the Court’s last major statement on the right to a dignified life to date. In some ways, it simply reaffirmed how an indigenous community’s *vida digna* depends on a robust relationship with its ancestral lands and natural resources. Yet there were signs that the Court may have restricted its concept of dignified life. It appears that *Advisory Opinion 23* placed more of an emphasis on “access” to *vida digna*¹³⁴ than

¹²⁷ *Id.*

¹²⁸ *Id.* ¶ 234.

¹²⁹ *Id.* ¶ 234.

¹³⁰ The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), *Advisory Opinion OC-23/17*, Inter-Am. Ct. H.R. (ser. A) No. 23.

¹³¹ *Id.* ¶ 48.

¹³² *Id.* ¶ 109.

¹³³ *Id.* ¶¶ 109, 117. *See also* Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶¶ 172, 181 (Nov. 25, 2015) (“[T]he Court has emphasized the importance of the protection, conservation and improvement of the environment contained in Article 11 of the [Protocol of San Salvador] as an essential human right related to the right to a dignified life derived from Article 4 of the Convention in light of the existing international *corpus iuris* on the special protection required by members of indigenous communities . . . the State must have adequate mechanisms to implement these criteria as a means of guaranteeing the right to a dignified life and to cultural identity to the indigenous and tribal peoples in relation to the protection of the natural resources that are in their traditional territories.”).

¹³⁴ *Advisory Opinion 23*, *supra* note 105, ¶¶ 48, 109, 114, 117.

before.¹³⁵ A positive right to a dignified life, as opposed to a mere ability to *access* such conditions, places far greater obligations on States. Further, unlike *Xákmok Kásek*, there was no allusion to education as a part of *vida digna*. Still, the Court did not claim to provide an exhaustive list of *vida digna*’s elements, and the opinion was intended to focus on environmental topics.¹³⁶

C. *Synthesis of the Vida Digna Approach*

As of this writing, the Court has indicated that water, nutrition, health care, housing, education, and ancestral lands all form part of a dignified life.¹³⁷ Most cases discussed above involved indigenous peoples, detainees, or marginalized children.¹³⁸ The situations often consisted of brutal State actions, such as in *Villagrán Morales*, or glaring omissions, like in *Xákmok Kásek Indigenous Community*. Nevertheless, a close textual analysis shows that those three specific groups are not required to “activate” *vida digna* obligations. Also unnecessary is a particularly shocking form of official action or omission. Rather, with this jurisprudence, the Court has developed an expansive State duty “to take positive, concrete measures” to protect individuals or communities who find themselves in “conditions of special, real and immediate risk” to a broad right to life.¹³⁹ If the authorities know or should know that persons are in such a situation, they must take reasonable

¹³⁵ It is true that *Villagrán Morales* described a “right that [a human being] will not be prevented from having access to the conditions that guarantee a dignified existence.” *Villagrán Morales v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 144. But “access” is mentioned less as the Court’s jurisprudence develops. *See, e.g.,* *Kaliña and Lokono Peoples*, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 172 (affirming an unqualified right to a dignified life); *Xákmok Kásek Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 217 (same); *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 162 (“[T]he State did not create the conditions and did not take the necessary steps for the boys and girls of the instant case to have and develop a decent life.”).

¹³⁶ *See* Advisory Opinion 23, *supra* note 105, ¶¶ 117, 109 (explaining that the requisites for a dignified life are water and adequate food, among others).

¹³⁷ The aspect of housing is less explicitly discussed in the case law, but it finds strong support in *Mapiripán Massacre* and *Yakye Axa*. *See* *Mapiripán Massacre* Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 161–62 (considering that many families were displaced from their homes and had to build shacks of tin and plastic, before declaring a *vida digna* violation); *Yakye Axa Indigenous Cmty.* Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 50.94, 164 (finding, as an element of a *vida digna* violation, that community members lacked access “to appropriate housing with the basic minimum services.”).

¹³⁸ Yet in *Mapiripán Massacre*, as described above, the Court took a somewhat different approach when it declared a *vida digna* violation with respect to internally-displaced adults (along with children), who had not been identified as indigenous peoples in the judgment. *Mapiripán Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 186, 189.

¹³⁹ *Yakye Axa Indigenous Cmty. v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 162; *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 217. Similarly, *Yakye Axa* asserts that States “must inescapably . . . generat[e] minimum living conditions that are compatible with the dignity of the human person.” *Yakye Axa Indigenous Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 162.

measures to protect them, or the State will violate, at a minimum, the right to *vida digna*.¹⁴⁰

Thus, the State obligations are more extensive than what many assume. The cases concerned traditionally-vulnerable individuals and communities, but indicate that States can be held liable for failing to ensure the right to dignified life of *any* person. The Court has yet to define its standards for “special, real and immediate risk.” But it should be noted that the Court does not require or perform personalized risk assessments in certain group cases, where it has found violations of the right to *vida digna* with respect to hundreds of indigenous community members, or even thousands of youth at the Paraguayan detention center.¹⁴¹ It is enough to show that the group, as a whole, faces threats to a dignified life. Further, in addition to the individual and collective reparations ordered in these judgments, the Court will often require structural remedies, such as legislative reform, reaching far beyond the victims of the case.¹⁴²

However, the *vida digna* approach may have already reached its high watermark. In *Advisory Opinion 23*, the Court noted that only in “exceptional circumstances” may the right to life be found violated when a victim has not died.¹⁴³ Lately, it does seem exceptional that the Court will declare a *vida digna* violation, or even devote significant attention to the concept.¹⁴⁴ In very recent cases, even when the Inter-American Commission or victims’ attorneys claim a breach of the right to a dignified life, the Court has avoided much discussion of the issue.¹⁴⁵ The main reason for this shift is explained in the next section.

¹⁴⁰ *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 188 (“In order for this positive obligation to be applicable, it must be established that at the moment the facts occurred, the authorities knew or should have known of the existence of a situation of real and immediate risk to the life of an individual or a particular group of individuals and that the authorities did not take the measures necessary within the scope of their duties that, reasonably speaking, one could expect to include preventing or avoiding those risks.”).

¹⁴¹ *See Juvenile Reeducation Institute v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 176 (“These violations were committed to the detriment of all inmates at the Institute in the period from August 14, 1996 to July 25, 2001.”).

¹⁴² *See, e.g., Xákmok Kásek Indigenous Cmty. v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 337 (ordering these various measures); *Juvenile Reeducation Institute v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶ 340 (ordering all such measures).

¹⁴³ *Advisory Opinion 23*, *supra* note 105, ¶ 109 (translation by author).

¹⁴⁴ *But see Muelle Flores v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 375, ¶¶ 197, 233 (Mar. 6, 2019) (stating that “retirement pensions, and in general social security, constitute a means of protection to enjoy a dignified life,” and ordering Peru to provide the victim a pension to secure him the “basic conditions of dignified life”) (translation by author).

¹⁴⁵ *See, e.g., Cuscul Pivaral v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 359 (Aug. 23, 2018) (discussed in text immediately below); *Duque v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct.

D. Article 26: A New Approach to Social Rights

The Court’s declining emphasis on *vida digna* is illustrated by the recent judgment *Cuscul Pivaral v. Guatemala*.¹⁴⁶ In *Cuscul Pivaral*, numerous petitioners argued that their right to *vida digna* was violated because Guatemala failed to adopt measures to ensure their adequate medical care. Yet the Court did not consider the links between life, personal integrity, and health, as it did two years earlier in *Chinchilla Sandoval v. Guatemala*.¹⁴⁷ Rather, the judgment held that because the facts constituted a violation of the right to health under the American Convention’s Article 26, it was unnecessary to examine the right to life.¹⁴⁸

The American Convention does not expressly establish the right to health.¹⁴⁹ Beyond the Convention’s Preamble, its Article 26 contains the main reference to social, economic, and cultural rights:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.¹⁵⁰

In 2017, the Court—for the very first time—found a violation of Article 26 in *Lagos del Campo v. Peru*.¹⁵¹ Since then, it has declared Article 26 violations in five more judgments, including *Cuscul Pivaral*, rapidly creating an entirely new line of jurisprudence on social rights.¹⁵²

H.R. (ser. C) No. 310 (Feb. 26, 2016); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245.

¹⁴⁶ *Cuscul Pivaral v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 359.

¹⁴⁷ *Chinchilla Sandoval v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 312.

¹⁴⁸ *Id.* ¶ 160.

¹⁴⁹ American Convention, *supra* note 36.

¹⁵⁰ *Id.* art. 26.

¹⁵¹ *Lagos del Campo v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 340 (Aug. 31, 2017).

¹⁵² See *Muelle Flores v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 375 (violation of the right to social security); *Cuscul Pivaral v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 359 (violation of the right to health); *Poblete Vilches v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349 (Mar. 8, 2018) (violations of the rights to health and to “obtain informed consent and access to information as relates to health”) (translation by author); *San Miguel Sosa v. Venezuela*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 348 (Feb. 8, 2018) (violation of the right to work); *Dismissed Employees of Petroperú v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 344 (Nov. 23, 2017) (violation of the right to work); *Lagos del Campo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 340 (violation of the right to “job stability”) (translation by author).

In these recent decisions, the Court variously held that the rights to social security, health,¹⁵³ work, and “job stability” are all protected by Article 26; in *Advisory Opinion 23*, it stated that the Article also safeguarded the right to “a healthy environment.”¹⁵⁴ The Court made these determinations by concluding that the rights are “implicit” in the Organization of American States (OAS) Charter’s “economic, social, educational, scientific, and cultural standards.”¹⁵⁵ For many years, the Court has considered that the American Declaration on the Rights and Duties of Man “contains and defines” the rights of the OAS Charter.¹⁵⁶ Consequently, it also has taken the Declaration’s provisions into account when deciding whether these social rights are protected by the Charter, and thus, by Article 26.¹⁵⁷

This pivotal, and surprising, development has attracted its share of controversy, and a few current judges continue to object to the approach. Some of the primary objections are outlined in this section, although a full discussion of the debate falls out of this Article’s scope. A first objection involves the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the “Protocol of San Salvador.”¹⁵⁸ Sixteen States have ratified or acceded to the Protocol of San Salvador, which entered into force in November of 1999.¹⁵⁹

The Protocol establishes the right to work, “just, equitable, and satisfactory conditions of work,” trade union rights, right to social security, right to health, right to “a healthy environment,” right to food, right to education, right to “the benefits of culture,” right to “the formation and the

¹⁵³ *Poblete Vilches* also established the right to “obtain informed consent and access to information as relates to health.” *Poblete Vilches v. Chile*, Inter-Am. Ct. H.R. (ser. C) No. 349, ¶ 267(5) (translation by author).

¹⁵⁴ *Advisory Opinion 23*, *supra* note 105, ¶ 57. See also Maria L. Banda, *Inter-American Court of Human Rights’ Advisory Opinion on the Environment and Human Rights*, ASIL INSIGHTS Vol. 22, Issue 6 (May 10, 2018) (“The recognition of an independent right to a healthy environment (justiciable under Article 26) could open the door to new categories of claims in the Inter-American system”).

¹⁵⁵ American Convention, *supra* note 36, art. 26.

¹⁵⁶ Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, *Advisory Opinion OC-10/89*, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 43 (July 14, 1989).

¹⁵⁷ However, note that the American Declaration does not mention all of these rights. Also, the Court purports to use other methods of interpretation as well, such as considering Article 29 of the American Convention and the Vienna Convention on the Law of Treaties.

¹⁵⁸ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”), O.A.S.T.S. No. 69, 28 I.L.M. 156 (Nov. 16, 1999).

¹⁵⁹ A:52: Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights “Protocol of San Salvador” General Information of the Treaty, <http://www.oas.org/juridico/english/sigs/a-52.html> [hereinafter Protocol of San Salvador] (last visited Oct. 27, 2019).

protection of families,” rights of children, and protections for the elderly and disabled.¹⁶⁰ However, the treaty grants jurisdiction to the Inter-American Commission and Court only over petitions that allege violations of Articles 8 and/or 13, which protect the rights to unions and education, respectively.¹⁶¹ Thus, critics of the Court’s new Article 26 approach argue that the States of the region created a specialized treaty for social rights that should not be disregarded—and in particular, this regional consensus provides the Court only very limited jurisdiction over these rights.¹⁶²

Second, Article 26’s “progressive” obligations caused the Court to hesitate for years on the question of justiciability. Could individual petitions prove a violation of such obligations, and thus be adjudicated by the Court? It took two decades for the Tribunal to acknowledge only that a State’s “progressive implementation” or regression with respect to social rights “may be subjected to accountability” under Article 26—without explaining how.¹⁶³ With recent changes to the Court’s roster of judges, however, this issue suddenly became much less of an obstacle.¹⁶⁴

A third concern, among others, involves the broad language of Article 26. If the Court adjudicates the provision in individual cases, this grants it wide discretion to define rights “implicit in” the OAS Charter’s “economic, social, educational, scientific, and cultural standards.”¹⁶⁵ In fact, a review of these numerous Charter “standards”—which in many instances refer to amorphous principles and objectives of public policy—confirms that the Court’s discretion has become expansive indeed.¹⁶⁶

¹⁶⁰ *Id.* arts. 6–18.

¹⁶¹ *Id.* art. 19(6).

¹⁶² See, e.g., *Lagos del Campo v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 340 (partially dissenting opinion of Judge Humberto Antonio Sierra Porto); Oswaldo Ruíz-Chiriboga, *The American Convention and the Protocol of San Salvador: Two Intertwined Treaties*, 31 NETH. Q. HUM. RTS. 159, 185–186 (2013) (criticizing the Court for paying insufficient attention to the Protocol).

¹⁶³ *Acevedo Buendía (“Discharged and Retired Employees of the Comptroller”) v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 198 ¶¶ 102–03 (July 1, 2009).

¹⁶⁴ See *Caso Poblete Vilches v. Chile*, Inter-Am. Ct. H.R. (Ser. C) No. 349 ¶ 104 (interpreting “immediate” state obligations in Article 26) (translation by author).

¹⁶⁵ See Christian Curtis, *El Artículo 26*, in *LA CONVENCIÓN AMERICANA COMENTADA* (2014) (in which Christian Curtis considers that the following Articles of the OAS Charter lead to social, economic and cultural rights: Articles 2, 3, 30, 31, 34, 39, 45, 46, 47, 48, 49, 50, and 52. Curtis has argued that, at a minimum, these rights include various cultural and consumer rights, as well as rights to education, work, social security, housing, food, and health).

¹⁶⁶ Charter of the Organization of American States art. 34, Apr. 30, 1948, 119 U.N.T.S. 3. (providing for: equality of opportunity; equitable distribution of wealth and income; increase of per capita national product; adequate and equitable systems of taxation; reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of land, diversification of production and improved processing and marketing systems for agricultural products; accelerated and diversified industrialization; stability of domestic price levels; fair wages, employment opportunities, and acceptable

In this way, despite the typical objections sketched here, the Court has introduced a second novel approach to social rights, after *vida digna*. In only two years, it has already shown enthusiasm for identifying these rights under Article 26 and finding States responsible for violations. The latest judgments, such as *Cuscul*, suggest that the Tribunal's current majority prefers to assess social rights independently, rather than link them to the right to life under a *vida digna* approach.

III. ANALYSIS OF THE RIGHT TO A DIGNIFIED LIFE: SUPRAPOSITIVE, CONSENSUAL, AND INSTITUTIONAL ASPECTS

A. Overview

This section will assess the Inter-American Court's *vida digna* approach through Gerald Neuman's useful analytical framework. According to Neuman, human rights have suprapositive, consensual, and institutional aspects.¹⁶⁷ Rights interpretation "draws on all three of these aspects in a manner that makes the convention system justifiable, politically acceptable, and effective."¹⁶⁸ To begin, suprapositive norms consist in "principles that have normative force independent of their embodiment in law, or even superior to the positive legal system."¹⁶⁹ These principles emanate from natural law, religion, ethics, and cultural values, among others; human rights treaty provisions often attempt to reflect these "preexisting" norms.¹⁷⁰

The consensual aspect in international law, of course, refers to the agreement of States. Their consensual actions include not only the creation and ratification of treaties, but also subsequent acts "of express or implicit consensual revision."¹⁷¹ Finally, the institutional element considers realities and limitations encountered when interpreting a right in a certain way. The institutional aspect does not necessarily provide a "third source of

working conditions for all; rapid eradication of illiteracy and expansion of educational opportunities for all; extension and application of modern medical science; proper nutrition; adequate housing; urban conditions that offer the opportunity for a healthful, productive, and full life; promotion of private initiative and investment in harmony with action in the public sector; and expansion and diversification of exports—all of which are referred to as "goals").

¹⁶⁷ Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L. L. 101, 111 (2008) [hereinafter Neuman 1]; Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1866 (2003) [hereinafter Neuman 2]. See also Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113, 126–158 (2008) (discussing the "essence," "consensus," and "obligations" approaches).

¹⁶⁸ Young, *supra* note 167, at 123.

¹⁶⁹ See Neuman 2, *supra* note 167, at 1868.

¹⁷⁰ *Id.*

¹⁷¹ Neuman 1, *supra* note 167, at 111.

legitimation” for rights, but rather may represent “practical constraints” on rights, which already derive their legitimacy from suprapositive or consensual sources.¹⁷² In a specific situation, the three elements can converge or diverge. For example, a particular interpretation of a right could reflect a suprapositive norm convincingly; however, from an institutional perspective the interpretation may pose significant complexities for enforcement.¹⁷³

B. *Suprapositive Aspect*

The Inter-American Court has called for States to safeguard the right to a dignified life. Beyond the Court and the Human Rights Committee, several domestic courts and international human rights authorities have joined dignity to the right to life. In 1981, the Supreme Court of India famously held:

The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.¹⁷⁴

Judges, human rights experts, and many others have drawn the intuitive conclusion that insufficient levels of food, shelter, health care, and other needs both imperil survival and deprive human existence of dignity.¹⁷⁵ In these circumstances, the right to life is emptied of its substance.

Clearly, the right to *vida digna* appeals directly to human dignity as its suprapositive principle. Human dignity has served as the foundation for the international human rights movement, the American and Universal Declarations of Human Rights, and the numerous instruments that

¹⁷² See Neuman 2, *supra* note 167, at 1869.

¹⁷³ *Id.* at 1872.

¹⁷⁴ Francis Coralie Mullin v. The Administrator, AIR 1981 SC 746 (India).

¹⁷⁵ See, e.g., Report of the Special Rapporteur on Adequate Housing, *supra* note 51, ¶ 27 (“The right to life cannot be separated from the right to a secure place to live, and the right to a secure place to live only has meaning in the context of a right to live in dignity and security, free of violence”); FARMER, *supra* note 29, at 16–17 (explaining how “the absence of social and economic power empties [other] rights of their substance”); Ibrahim Sangor Osman and Others v. the Hon. Minister of State for Provincial Administration and Internal Security and Others (2011) K.L.R. (H.C.K.) (Kenya) (“[P]eople living without the basic necessities of life are deprived of human dignity, freedom and equality”); Government of the Republic of South Africa and Others v. Grootboom and Others, 2000 (10) BCLR 84 (CC) ¶ 44 (S. Afr.) (“A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.”); JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991 3 (1993) (“[N]o society can pride itself on respect for the individual if its social and economic structures have the effect of excluding large numbers of people from access to . . . necessities of material life.”).

followed.¹⁷⁶ “The dignity and worth of the human person”¹⁷⁷ encompasses several religious and philosophical traditions, which has led to the principle’s repeated affirmation in the halls of the United Nations and at constitutional conventions across the globe.¹⁷⁸

As it is embraced by diverse communities, there are also a number of ways to explain and define human dignity.¹⁷⁹ The concept, without more, does not precisely set the boundaries of the right to life, nor does it specify exactly which social, economic, and cultural norms inhere to the right.¹⁸⁰ Dignity could arguably lead to requirements for a prosperous life, or merely to demand survival conditions. In most cases, when courts apply human dignity to the right to life, they expand the right’s content, perhaps to better reflect the suprapositive nature of dignity. Judges have also enlisted human dignity to extend other rights or even to create new ones.¹⁸¹

Below, the section on institutional aspects will consider consequences for the right to life when judges and others interpret it in light of human dignity. For now, it is sufficient to identify the suprapositive principle that forms the basis for the right to *vida digna*. While varying in meaning, human dignity stands as one of the most accepted and powerful principles in law, philosophy, and religion.¹⁸²

¹⁷⁶ See Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, Preamble, O.A.S. Doc. OEA/Ser.L.V./II.82 doc.6 rev.1 (1948) (“All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.”); G.A. Res 217 (III) A, Universal Declaration of Human Rights, at 72 (Dec. 10, 1948) (“Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”). See also Charter of Fundamental Rights of the European Union, 2012 O.J. (C326) 396 (“Human dignity is inviolable. It must be respected and protected.”).

¹⁷⁷ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁷⁸ See UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2013) (several chapters exploring historical, theological, philosophical, and judicial aspects of human dignity); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 656–663 (2008).

¹⁷⁹ See McCrudden, *supra* note 178, at 655.

¹⁸⁰ In international human rights law, human dignity often serves as a foundational norm (appearing in the Preambles of the ICCPR and the ICESCR, for example), but occasionally appears in operational provisions as well. See Gerald L. Neuman, *Discourses of Dignity*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 178, at 643. To illustrate, in the articles of the American Convention, dignity is referenced with respect to the treatment of detained persons, forced labor, and the rights to privacy and honor. See American Convention, *supra* note 36, arts. 5, 6, and 11.

¹⁸¹ See McCrudden, *supra* note 178, at 721. Paolo Carozza suggests caution before expanding rights with human dignity, as the result may not reflect “shared experience.” Paolo Carozza, *Human Rights, Human Dignity, and Human Experience*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 178, at 629.

¹⁸² See Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 178, at 1 (“[H]uman dignity has probably never been . . . so deeply embedded in political and legal discourse The power of the concept of human

C. Consensual Aspect

This section assesses to what extent States Parties to the American Convention on Human Rights may have consented to the right to a dignified life. To do so, it first considers the Convention’s text, context, and negotiating history. Then, the analysis examines additional relevant instruments in the Inter-American System, as well as State constitutional law and practice—in particular State responses to the Inter-American Court’s judgments on *vida digna*.

The American Convention’s Article 4(1) establishes: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”¹⁸³ The rest of the Article’s paragraphs address the death penalty.¹⁸⁴ The American Convention’s formulation of the right to life mainly drew from the ICCPR’s life provision, with only a few exceptions.¹⁸⁵ Neither the official negotiation record on Article 4, nor the provision itself expressly refers to a broader right to a dignified life.¹⁸⁶

The authoritative Vienna Convention on the Law of Treaties provides familiar rules of interpretation for treaties.¹⁸⁷ The ordinary meaning of Article 4 may not indicate a concept of *vida digna*; however, the context and purpose of the treaty should also be considered.¹⁸⁸ In this way, the Convention’s other

dignity is unquestionable.”); ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2013) (discussing how courts around the world interpret dignity); Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT’L L. 931, 935 (2008) (affirming dignity’s capacity to “challenge and undermine the legitimacy of a wide array of political and economic systems which . . . have wielded power in ways systematically contrary to the good of human persons.”); Young, *supra* note 167, at 133 (Human dignity is “a value that arguably represents the reigning ideology of both human rights and liberal constitutionalism.”).

¹⁸³ The American Convention is the only human rights treaty that expressly determines the point from which the right to life must be safeguarded. ANTKOWIAK & GONZA, *supra* note 34, at 57. The European Convention establishes a list of possible limitations to life, while the American Convention, the ICCPR, and the African Charter take a more flexible approach, prohibiting “arbitrary” deprivations of life. *Id.* at 58.

¹⁸⁴ See American Convention, *supra* note 36, art. 4, ¶ 2–6 (referring to capital punishment).

¹⁸⁵ As noted, the American Convention specifies the point from which the right to life must be protected; in addition, during the treaty’s negotiation, State delegates increased limitations on capital punishment. See ANTKOWIAK & GONZA, *supra* note 34, at 59–60.

¹⁸⁶ Near the end of the conference that adopted the American Convention, however, the United States and Brazilian delegations issued a vague resolution that stated, “The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties discretion with respect to the content of legislation in the light of their own social development, experience and similar factors.” Minutes of the Second Plenary Session, Doc. 86, 441, (Nov. 22, 1969), available at <https://www.oas.org/es/cidh/mandato/Basicos/actas-conferencia-interamericana-Derechos-Humanos-1969.pdf>.

¹⁸⁷ Vienna Convention on the Law of Treaties, arts. 31–33, May 23, 1969, 1155 U.N.T.S. 331.

¹⁸⁸ *Id.* art. 31.

terms and Preamble should be examined, as well as subsequent agreements and practice by States Parties, among other aspects.¹⁸⁹

As noted above, the Convention's Article 26 provides that States must "undertake to adopt measures" toward the "full realization of the rights implicit" in the provisions of the OAS Charter.¹⁹⁰ The OAS Charter's Article 34 actually mentions *vida digna*—although it is translated as "full life"—where it sets out developmental goals for States, including "[u]rban conditions that offer the opportunity for a healthful, productive, and full life."¹⁹¹ The American Convention's Preamble also supports dignified living conditions by declaring "the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights."¹⁹²

The San Salvador Protocol to the American Convention, as discussed previously, sets out a range of social rights, but has not been fully ratified in the region. The Protocol makes two references to *vida digna* and two to "dignified subsistence," in the context of the rights to work, social security, and education.¹⁹³ The instrument does not directly establish dignified life as a right, but rather as an objective to be attained through these other rights. The recent Inter-American Convention on Protecting the Human Rights of Older Persons, which entered into force in 2017 and has been ratified by seven nations, similarly refers to *vida digna* in relation to the right to social security.¹⁹⁴

¹⁸⁹ *Id.* arts. 31–33.

¹⁹⁰ American Convention, *supra* note 36, art. 26.

¹⁹¹ Charter of the Organization of American States art. 34, Apr. 30, 1948, 119 U.N.T.S. 3. The Inter-American Commission's original draft proposal for the American Convention contained the standards currently found in the OAS Charter's Article 34; this text was eventually removed in the final version of the Convention's Article 26. See Thomas Antkowiak, *Social, Economic, and Cultural Rights: The Inter-American Court at a Crossroads*, in *THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE* 260–61 (Yves Haeck, Oswaldo Ruiz-Chiriboga & Clara Burbano Herrera eds., 2015). See also *id.* art. 45(a) ("All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.").

¹⁹² American Convention, *supra* note 36, Preamble (referring to "the Third Special Inter-American Conference [that] approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters.").

¹⁹³ Protocol of San Salvador, *supra* note 159, arts. 6–7, 9, 13.

¹⁹⁴ Inter-American Convention on Protecting the Human Rights of Older Persons art. 17, June 15, 2015, 55 I.L.M. 985. Among other rights, this Convention also establishes that "[o]lder persons have the right to decent and adequate housing and to live in safe, healthy, and accessible environments that can be adapted to their preferences and needs." *Id.* art. 24.

In addition to the regional treaties, the American Declaration on the Rights and Duties of Man, which preceded the American Convention, certainly merits discussion. While formally non-binding, the Declaration stands as a very influential instrument for the Americas.¹⁹⁵ The Declaration’s Article XI, titled “Right to the preservation of health and to well-being,” provides:

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.¹⁹⁶

Other Declaration articles recognizing the rights to education, work, and property seek to “attain a decent life,” a “suitable standard of living,” and the “essential needs of decent living,” respectively.¹⁹⁷ Finally, the Social Charter of the Americas, adopted in 2012, declares in its first article that OAS Member States must promote development “with a view to eliminating poverty, especially extreme poverty, and achieving a decent standard of living for all.”¹⁹⁸

Of course, human rights treaties are special international agreements, which attempt to protect individuals and groups, rather than to benefit States Parties directly. Both the Inter-American and European human rights systems have affirmed that their conventions are “living instruments,” whose interpretation “must consider changes over time and present-day conditions.”¹⁹⁹ Thus, both the Inter-American and European Courts have engaged in “evolutive interpretation”²⁰⁰ to ensure that treaty rights stay both “contemporary and effective.”²⁰¹ Over the years, the European Court in

¹⁹⁵ See Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, in COMMITMENT AND COMPLIANCE, THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 393–94 (Dinah Shelton ed., 2000); Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 42–43 (July 14, 1989). As noted earlier, the Declaration also influences the interpretation of rights in the OAS Charter.

¹⁹⁶ Organization of American States, American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. XI, O.A.S. Doc. OEA/Ser.L.V./II.82 doc.6 rev.1 (1948).

¹⁹⁷ *Id.* arts. XII, XIV, XXIII, respectively.

¹⁹⁸ Social Charter of the Americas art. 1, Sept. 20, 2012, AG/doc.5242/12 rev. 2. In 2015, OAS Member States approved a Plan of Action for the Social Charter. *OAS Adopts Plan of Action of the Social Charter of the Americas*, SEDINEWS, http://www.oas.org/en/sedi/nl/0215/1_en.asp (last visited Dec. 23, 2019).

¹⁹⁹ Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, ¶ 114 (Oct. 1, 1999); *Tyrer v. the United Kingdom*, 26 Eur. Ct. H.R. (ser. A), ¶ 183 (1978).

²⁰⁰ *Id.*

²⁰¹ Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L.J. 10, 1730, 1730 (2011) (“An evolutive interpretation of

particular has paid close attention to evolving consensus among States Parties—as expressed through national law and practice, as well as standards issued by the Council of Europe—before extending and redefining Convention rights.²⁰²

Having examined relevant Inter-American human rights instruments, national constitutional law should now be considered for a possible consensus on *vida digna*. For many decades, the nations of Central and South America have recognized human dignity in their constitutions.²⁰³ In these texts, dignity often features as one of the central national values and as a basis for fundamental rights. Since 1988, Latin America has experienced a wave of constitutional creation and reform.²⁰⁴ This period of renewal has led to the greater incorporation of economic, social, and cultural rights, as well as stronger connections of domestic legal systems to international human rights law—including the case law of the Inter-American Court.²⁰⁵

the ECHR is the tool that keeps the meaning of the rights both contemporary and effective.”). Citing this “evolution of the fundamental rights of the human person in contemporary international law” and the American Convention’s savings clause (Article 29), the Inter-American Court frequently refers to other international instruments in order to develop the content of the Convention’s rights. *See, e.g.*, Chitay Nech v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 165 (May 25, 2010) (using the Convention on the Rights of the Child to define contours of the American Convention’s Article 19, Rights of the Child); Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 92 (referring to the ILO Convention No. 169 to assess indigenous rights to property).

²⁰² *See* Dzehtsiarou, *supra* note 201, at 1731 (quoting *Tyrer*, 26 Eur. Ct. H.R. (ser. A), ¶ 183); Neuman 1, *supra* note 167, at 102, 107 (also noting that, with respect to importing international principles and case law, “the [Inter-American] Court has come to undervalue the consent of the relevant community of states as a factor in the interpretation of a human rights treaty.”). More recently, the Inter-American Court has taken a greater interest in regional standards and national law. *See, e.g.*, ANTKOWIAK & GONZA, *supra* note 34, at 2, 161–62 (observing greater deference to States and domestic law in the Court’s newer judgments); Kichwa Indigenous People of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 159–64 (surveying national laws in the Americas on “the right to consultation of indigenous and tribal communities.”).

²⁰³ *See* McCrudden, *supra* note 178, at 664. Thirty Constitutions in the Americas currently refer to “human dignity” or “dignity,” <https://www.constituteproject.org> (follow “Explore Constitutions” hyperlink; then search for “dignity”; then filter by country and select “Americas, Entire Region”).

²⁰⁴ Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1587 (2011).

²⁰⁵ *See id.* at 1589–94; Sergio García Ramírez, *The Relationship between Inter-American Jurisdiction and States (National Systems): Some Pertinent Questions*, 5 NOTRE DAME J. INT’L COMP. L. 115, 128 (2015) (“Recent decades have seen important constitutional reforms in various American nations, with . . . a single goal—the primacy of human rights—and an alliance, for this purpose, between international treaties and domestic norms.”); Carlos E. Gallegos Anda, *Good Living and Vida Digna: Latin American Approaches to Social and Economic Inequality* 9, https://www.academia.edu/32427106/Good_Living_and_Vida_Digna_Latin_American_Approaches_to_Social_and_Economic_Inequality.

As for *vida digna* specifically, the constitutions of Bolivia, Ecuador, and Venezuela all expressly refer to this term.²⁰⁶ Ecuador directly establishes a right to *vida digna*, which “assures” health, nutrition, housing, potable water, and “other necessary social services.”²⁰⁷ Several other constitutions of the region use comparable phrases: “dignified existence,” “decent existence,” or the “good life.”²⁰⁸ While these concepts are usually not framed as rights, various texts establish, as a major national objective, that poverty or inequality should be addressed to achieve a “dignified existence” for all.²⁰⁹ An even greater number of constitutions require employment rights and benefits in order to ensure “dignified” living conditions.²¹⁰ Further,

²⁰⁶ In the Constitutions of Bolivia and Venezuela, the term *vida digna* is used where demanding employment rights and benefits that will ensure a dignified life. CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, art. 70 (Bol.); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA Dec. 20, 1999, art. 100. The San Salvador Protocol to the American Convention takes a similar approach. See Protocol of San Salvador, *supra* note 159, arts. 6, 9.

²⁰⁷ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR Sept. 28, 2008, art. 66(2) (“El derecho a una vida digna, que asegure la salud, alimentación y nutrición, agua potable, vivienda, saneamiento ambiental, educación, trabajo, empleo, descanso y ocio, cultura física, vestido, seguridad social y otros servicios sociales necesarios.”).

²⁰⁸ See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Oct. 5, 1988, art. 170 (Braz.) (“The economic order” is “intended to assure everyone a dignified existence.”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, 1972, art. 64 (State is obliged to “ensure to every workman the necessary conditions for a decent existence.”); Constitución Política del Estado Feb. 7, 2009, art. 8 (Bol.) (“The State adopts and promotes” principles such as “teko kavi (good life) . . .”).

²⁰⁹ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Oct. 5, 1988, arts. 3, 170 (Braz.) (“Fundamental objective” of the State is “to eradicate poverty” and substandard living conditions . . . “The economic order, founded on the appreciation of the value of human labor and free enterprise, is intended to assure everyone a dignified existence.”); CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] Jul. 4, 1991, arts. 2, 334 (explaining that an “essential” purpose is to promote “general prosperity” and the “improvement of the quality of life of the inhabitants.”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. VI, ch. I, art. 98, LA GACETA, DIARIO OFICIAL [L.G.] Jan. 9, 1987, as amended by Ley No. 854, Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua, L.G. Feb. 10, 2014 (“The principal function of the State in the economy is to achieve the sustainable human development in the country; to improve the living conditions of the people and to realize a more just distribution of wealth in the pursuit of a good life.”); CONSTITUCIÓN POLÍTICA DEL ESTADO Feb. 7, 2009, Preamble (Bol.) (“A State based on respect and equality for all, on principles of sovereignty, dignity, interdependence, solidarity, harmony, and equity in the distribution and redistribution of the social wealth, where the search for a good life predominates.”); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR Sept. 28, 2008, Preamble (“Decidimos construir una nueva forma de convivencia ciudadana, en diversidad y armonía con la naturaleza, para alcanzar el buen vivir, el sumak kawsay.”).

²¹⁰ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA Nov. 7, 1949, art. 57 (referencing a “dignified existence” in this context); CONSTITUCIÓN DE LA REPÚBLICA DE CUBA Feb. 24, 2019, art. 31 (“Paid labor must be the principal source of income that sustains dignified living conditions.”); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR Dec. 20, 1983, art. 37 (“State shall employ all resources that are in its reach to provide employment . . . and to ensure . . . the economic conditions for a dignified existence.”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA, May 31, 1985, art. 102(a) (“The right to the free choice of work and the satisfactory economic conditions that guarantee a dignified existence for the worker and his [or her] family.”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [CN.] tit. IV, ch. V, art. 82, LA GACETA, DIARIO OFICIAL [L.G.] Jan. 9, 1987, as amended

constitutional and high courts in Latin America have strengthened the links between life, dignity, and living conditions.²¹¹

Also relevant in assessing regional consent is a review of how States have responded to the Inter-American Court's case law on *vida digna*. Especially over the last decade, the Inter-American Court and the Inter-American Commission have faced resistance by States due to various legal and institutional issues.²¹² Yet it appears that the Court's right to *vida digna* has not directly caused conflict or backlash.

When debated before the Court,²¹³ defendant States at times have not explicitly addressed the right to a dignified life.²¹⁴ On other occasions, States have recognized the importance of dignified living conditions or the right to

by Ley No. 854, Ley de Reforma Parcial a la Constitución Política de la República de Nicaragua, L.G. Feb. 10, 2014 ("Equal pay for equal work under identical conditions . . . which ensure well-being compatible with human dignity"); CONSTITUCIÓN NACIONAL DE LA REPÚBLICA DEL PARAGUAY Jun. 20, 1992, art. 92 ("[W]orkers have the right to enjoy a remuneration that assures . . . a free and dignified life."). See also CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ 1972, arts. 64, 122 (setting out a stronger formulation of the right of workers and farmers to a "decent existence").

²¹¹ See, e.g., Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025, (¶ 6.3.2) (Colom.) (stating that the right to *vida digna*, among others, of the case's displaced communities is under threat because of their difficult living conditions); Corte Constitucional [C.C.] [Constitutional Court] mayo 10, 2010, Sentencia 0108/2010-R, numero de archivo 2006-14391-29-RAC (Bol.) (finding that the rights to life and health were violated when HIV medication was not consistently provided to a child); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 01/06/2000, "Association Benghalensis," A. 186. XXXIV (Arg.) (holding that the State is obligated to care for HIV patients, under the premise that the right to life includes the right to health); Flavia Piovesan, *Brazil: Impact and Challenges of Social Rights in the Courts*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW*, *supra* note 37, at 182, 185 (describing several rulings from the Brazilian Supreme Court that established that "the right to health derives from the right to life, thereby recognizing a right to medicine among the underprivileged" and sick).

²¹² See, e.g., Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 *YALE J. INT'L L.* 179 (2019); Alexandra Huneus, *Courts Resisting Courts: Lessons From The Inter-American Court's Struggle To Enforce Human Rights*, 44 *CORNELL INT'L L.J.* 493 (2011); Press Release, Colom. Minister of Foreign Affairs, Comunicado de prensa del Ministerio de Relaciones Exteriores sobre el Sistema Interamericano de Derechos Humanos (Apr. 24, 2019), available at <https://id.presidencia.gov.co/Paginas/prensa/2019/190424-Comunicado-de-prensa-del-Ministerio-de-Relaciones-Exteriores-sobre-el-Sistema-Interamericano-de-Derechos-Humanos.aspx> (requesting, in part, that the Inter-American System's reparations be more "proportionate" and respect the "realities" of the States). See also *infra* Part III(D)(2) (discussing development projects on indigenous lands); Ximena Soley and Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 *INT'L J. L. IN CONTEXT* 237 (2018); René Urueña, *Double or Nothing? The Inter-American Court of Human Rights in an Increasingly Adverse Context*, 35 *WIS. INT'L L.J.* 398 (2018).

²¹³ This research takes into account the summaries of arguments provided by the Court in its judgments.

²¹⁴ See, e.g., Villagrán Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63; Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134.

vida digna; however, they disputed a violation in the specific situation.²¹⁵ In the notable case *Gonzales Lluy v. Ecuador*, during a public hearing the State accepted responsibility for certain facts, and “offered” to the victim “a decent life [*vida digna*], health, education, a public apology” and “decent housing . . . to ensure [her] right to life.”²¹⁶

Although States cannot appeal Court judgments, they can request an interpretation of the decision.²¹⁷ Occasionally, States attempt to challenge judgments by this means.²¹⁸ As of this writing, there have been no interpretation judgments on the right to *vida digna*.²¹⁹ In contrast, after the *Lagos del Campo* decision, Peru promptly asked the Court why it assessed a right to “job stability” in the case, and argued that the Article 26 violation was not justified.²²⁰

On the other hand, States have not always complied promptly with socio-cultural reparations in the Court’s judgments on *vida digna*.²²¹ It is true that *Villagrán Morales*’ limited remedies in this area were completed.²²² But

²¹⁵ See, e.g., *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 235 (“[T]he State reiterated that it cannot be claimed that the impact of the oil company’s activities has caused serious harm to the conditions required for a decent life for the Sarayaku.”); *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 147(c) (“Within the limitations of a relatively less developed country . . . the State has created the conditions necessary to guarantee a decent life for these indigenous populations, providing periodical food and sanitary assistance . . .”).

²¹⁶ *Gonzales Lluy v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 298, ¶ 45. In another relevant case, *Ortiz Hernández v. Venezuela*, the State declared that it would take various measures to “ensure conditions of dignified life to the victim and family members, attending fully to their duly determined socio-economic needs.” *Ortiz Hernández v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 338, ¶ 219 (Aug. 22, 2017) (translation by author).

²¹⁷ See American Convention, *supra* note 36, art. 67 (“The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.”).

²¹⁸ The Court has emphasized that interpretation requests “should not be used as a means of contesting” or modifying the judgment. See, e.g., *Abrill Alosilla v. Peru*, Interpretation of the Judgment on Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 235, ¶ 10 (Nov. 21, 2011); *Fernández Ortega v. Mexico*, Interpretation of the Judgment on Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 224, ¶ 11 (May 15, 2011).

²¹⁹ See, e.g., *Yakye Axa Indigenous Cmty. v. Paraguay*, Interpretation of the Judgment on Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 142 (Feb. 6, 2006) (refraining from discussing the right to *vida digna*).

²²⁰ *Lagos del Campo v. Peru*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 366, ¶ 13 (Nov. 21, 2018).

²²¹ For official information regarding State compliance, see Inter-American Court of Human Rights, Monitoring Compliance with Judgment, available at http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_supervision_cumplimiento.cfm?lang=en.

²²² *Villagrán Morales v. Guatemala*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R., “Having Seen,” ¶¶ 3–4 (Jan. 27, 2009) (finding Guatemala complied with monetary reparations, as well as orders to reform legislation, to assist with a victim’s burial, and to “designate an educational center with a name allusive to the young victims in this case and place, in this

the Court's sweeping orders to provide medical and psychological treatment to numerous victims in *Juvenile Reeducation Institute v. Paraguay* and *Mapiripán Massacre v. Colombia*²²³ have not yet been fulfilled, nor have *Juvenile Reeducation Institute's* vocational training programs.²²⁴

As for the indigenous community cases against Paraguay, the Court required, among other measures, the return of traditional territories, community development funds, and "the provision of basic goods and services necessary for the subsistence of community members."²²⁵ According to official Court documents, Paraguay has not yet completed all of these reparations; however, the Sawhoyamaya and Xákmok Kásek communities have returned to their lands, and authorities have provided potable water, food, and medical attention.²²⁶ In these cases, it is difficult to conclude that compliance delays prove a principled opposition to the right to a dignified life.²²⁷ In general, States often take significant time to fulfill Court reparations, especially if they require substantial financial resources, political will, or technical expertise.²²⁸

center, a plaque with [their] names"; however, it has not adequately investigated and punished the responsible parties); 12 Guatemalan Cases, Monitoring Compliance with Judgment, Order of the Court, 2015 Inter-Am. Ct. H.R. (Nov. 24, 2015).

²²³ *Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment, Order of the Court, 2012 Inter-Am. Ct. H.R., "Declares," ¶ 5 (Nov. 23, 2012) (Among other measures, Colombia also has not completed orders to build a memorial for the massacre or to ensure that the displaced villagers can safely return); *Juvenile Reeducation Institute v. Paraguay*, Monitoring Compliance with Judgment, Order of the Court, 2009 Inter-Am. Ct. H.R., "Declares," ¶ 2 (Nov. 19, 2009); Press Release, Inter-American Court, Corte Interamericana realiza visita al Paraguay para supervisar cumplimiento de sentencias, CP-46/17 (Dec. 7, 2017), http://www.corteidh.or.cr/docs/comunicados/cp_46_17.pdf (indicating that the Court was formally inquiring into the medical/psychological and vocational reparations, among others, during its visit to Paraguay).

²²⁴ *Juvenile Reeducation Institute v. Paraguay*, Order of the Court, 2009 Inter-Am. Ct. H.R., "Declares," ¶ 2.

²²⁵ *The Cases of the Yakye Axa, Sawhoyamaya and Xákmok Kásek Indigenous Communities v. Paraguay*, Monitoring Compliance with Judgments, Order of the Court, 2017 Inter-Am. Ct. H.R., "Resolves," ¶ 3 (Aug. 30, 2017).

²²⁶ See Press Release, Inter-American Court, Corte Interamericana realiza visita al Paraguay para supervisar cumplimiento de sentencias, CP-46/17 (Dec. 7, 2017), http://www.corteidh.or.cr/docs/comunicados/cp_46_17.pdf, ("The Yakye Axa community continues living in a reduced space on the side of the road . . . and not in the lands that must be delivered to them. The Sawhoyamaya and Xákmok Kásek communities are living on their traditional lands, which still have not been titled.") (translation by author); *Yakye Axa Indigenous Community v. Paraguay*, Order of the Court, 2019 Inter-Am. Ct. H.R., "Resolves," ¶ 2-4 (indicating progress and delays with reparations); *Yakye Axa Indigenous Community v. Paraguay*, Order of the Court, 2008 Inter-Am. Ct. H.R., "Declares" (Feb. 8, 2008) (same).

²²⁷ It should be noted that none of these compliance orders made reference to or discussed *vida digna*.

²²⁸ See Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279 (2011); Caroline Bettinger-López, *The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case*, 15

In sum, it appears very unlikely that, at the time of its adoption, the American Convention contained extensive positive obligations to ensure a dignified life. Yet a regional commitment has been increasingly articulated to secure dignified living conditions for the inhabitants of the Americas. The emergence of a *right* to a dignified life, especially through the Inter-American Court’s case law, has pushed this commitment to become more concrete and justiciable. Latin American States have apparently not opposed this conceptual evolution, and they also did not object when the Human Rights Committee recently endorsed “the right to life with dignity.”²²⁹ Certainly, however, significant effort will be required to further develop and implement this right in the national law and practice of the region.

D. Institutional Aspects

1. Challenges with courts adjudicating social rights in general

This section considers various institutional issues encountered when courts adjudicate social rights in general, and when the Inter-American Court specifically applies human dignity to the right to life. One of the major, longstanding objections to social rights concerns the role of judges in their interpretation and enforcement.²³⁰ By adjudicating these rights, courts become more involved in determining socio-economic policies and allocating limited governmental resources.²³¹

Granting an unaccountable body too much authority in this arena could “empt[y] the democratic process of its necessary content, preventing . . . vital

CUNY L. REV. 315, 317–18 (2012); CARLOS M. BERISTAIN, DIÁLOGOS SOBRE LA REPARACIÓN: EXPERIENCIAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS, VOL. II 531 (2008).

²²⁹ The only Latin American State to submit observations on the Human Rights Committee’s draft general comment was Brazil, in order to condemn the use of nuclear weapons. See U.N. Human Rights Comm., General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights—Right to life, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> (last visited Nov. 15, 2019).

²³⁰ See, e.g., ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY 81 (2012) (explaining that the “main criticism” of social rights is that efforts to address inequality and poverty “should focus on the political process” and “democratic decision-making” and not on the courts). Other objections to social rights include that they are too expensive, too vague, encourage laziness, penalize the creation of wealth, undermine economic growth, and grant too much power to the State. See Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 65; Bernard Duhaime, *Le Système Interaméricain et la Protection des Droits Économiques, Sociaux et Culturels des Personnes et des Groupes Vivant dans des Conditions Particulières de Vulnérabilité*, 44 CAN. Y.B. INT’L LAW 95, 131–35 (2006) (reviewing several of these objections and considering whether they are fair or justified).

²³¹ See, e.g., WICKS, *supra* note 68, at 222 (“[T]he judiciary may regard itself as not best placed to make decisions about allocating resources.”); Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, PUB. L. 498, 512 (2006) (“Positive duties are often thought to be better suited to the political than the judicial arena, because decision-makers are accountable to the electorate for their decisions as to how to balance competing claims on resources.”).

debates about the minimum substance of social and economic protection.”²³² In some nations, judicial intervention has been ambitious and could create unexpected imbalances and financial burdens.²³³ For example, if a court orders a sizable community development fund whose amount is disproportionate to local realities, this could create financial strain that will hinder the State’s ability to assist similar communities, as well as to protect social rights in general.

Similarly, critics argue that courts lack the technical capacity and expertise to define and enforce social rights.²³⁴ Some judges themselves have shown reluctance “to perform the roles required to promote the deeper understanding of economic and social rights and their implementation by diverse governmental agencies.”²³⁵ In fact, the South African Constitutional Court stated that it was “not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining the minimum-core standards [for a right to health care], nor for deciding how public revenues should most effectively be spent.”²³⁶

A different concern involves the position of judges in society. If judges enjoy elite socio-economic status, can they be trusted to endanger their own privileges to increase protections for the poor and marginalized?²³⁷ Especially in this context, public interest litigation can potentially result in judgments that narrow rights and “impede rather than facilitate transformation.”²³⁸

²³² Young, *supra* note 167, at 160.

²³³ Alexandra Huneeus observes that high courts in several nations have ordered “significant reform of how government provides particular services,” but notes that it is uncertain “under what circumstances such rulings are effective in altering the distribution of material and symbolic goods in a society.” Alexandra Huneeus, *Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts*, 40 YALE J. INT’L L. 1, 2 (2015). See also MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 310 (1990) (discussing unintended effects of judicial decisions).

²³⁴ See, e.g., David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L.J. 189, 194 (2012); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT’L J. CONST. L. 13 (2003); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 223 (2001).

²³⁵ Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 36.

²³⁶ Minister of Health v. Treatment Action Campaign, Case No. CCT 8/02, Judgment, ¶ 27 (Const. Ct. July 5, 2002).

²³⁷ It is acknowledged that wealthy elites are in the legislatures as well as the courts. Furthermore, of course, not all judges are either elite or unelected.

²³⁸ SANDRA LIEBENBERG, SOCIO-ECONOMIC RIGHTS: ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION 77–78 (2010). See also Neuman 2, *supra* note 167, at 1893 (“Constitutionalizing the rights and giving a small legal elite final power to interpret them may obstruct rather than facilitate that debate.”); Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 65 (explaining that “the biggest challenge by far is essentially ideological . . . [t]he economic and political power of entrenched elites is best protected by policies that marginalize ESC rights.”).

Many of these challenges are compounded when *supranational* courts adjudicate social, economic, and cultural rights. Inter-American Court judges, for example, are unaccountable to the region’s populace; only one sitting judge, at maximum, can be nominated by any specific nation’s government.²³⁹ International judges, often affluent, may not be deeply familiar (or sympathetic) with the specific socio-economic difficulties and capabilities of the States that come before them. Further, supranational courts have less access to evidence and fact-finding mechanisms than their national counterparts.²⁴⁰ It is not surprising, then, that several States resisted the Optional Protocol to the ICESCR, which provides for an individual petition system.²⁴¹ David Marcus noted that “even robust welfare states with active judiciaries balk[ed] at the prospect of analogous international adjudication.”²⁴²

Still other institutional complications may arise with the supranational litigation of social rights, such as possible conflicts among peer tribunals. In the Council of Europe, both the European Court and the European Social Committee could potentially examine these rights. As for the United Nations System, numerous authorities in addition to the Human Rights Committee could interpret and monitor social rights, with the Committee on Economic, Social and Cultural Rights serving as the primary treaty body.²⁴³ Concerns about overreaching likely have contributed to cautious approaches from the European Court, and even the Human Rights Committee before 2018.²⁴⁴

Nevertheless, numerous constitutions across the globe—including in the Americas—have established social rights as justiciable.²⁴⁵ Increasingly,

²³⁹ See American Convention, *supra* note 36, art. 52(2) (“No two judges may be nationals of the same state.”).

²⁴⁰ See, e.g., Nancy Amoury Combs, *From Prosecutorial to Reparatory: A Valuable Post-Conflict Change of Focus*, 36 MICH. J. INT’L L. 219, 234–39 (2015) (explaining fact-finding difficulties for international criminal tribunals); James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 803–08 (2008) (describing fact-finding limitations for the Inter-American Court of Human Rights).

²⁴¹ See David Marcus, *The Normative Development of Socioeconomic Rights through Supranational Adjudication*, 42 STAN. J. INT’L L. 53, 65–66 (2006) (citing the objections of Argentina, Italy, Germany, and India).

²⁴² *Id.* at 65.

²⁴³ Numerous United Nations treaty bodies, Special Procedures, and other authorities could potentially analyze social rights. For a helpful presentation of these many human rights mechanisms, see generally Jane Connors, *United Nations*, in INTERNATIONAL HUMAN RIGHTS LAW 369–410 (Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran eds., 2018).

²⁴⁴ These approaches are discussed in Part I(C), *supra*.

²⁴⁵ See Report of the Special Rapporteur on Extreme Poverty, *supra* note 19, ¶ 33; SUNSTEIN, *supra* note 234, at 221 (“A remarkable feature of international opinion—indeed a near consensus—is that socioeconomic rights deserve constitutional protection.”).

national courts have shown themselves capable of interpreting and developing these rights.²⁴⁶ As constitutional provisions are translated into statutes and regulations, States must require further training and education for their judges in this complex, multi-disciplinary field. Although it may be preferable for solutions to be pursued through various non-judicial means, if such means prove ineffective, a court must ultimately be available to remedy violations of rights established by law.

As for controversies surrounding the supranational adjudication of social rights, at least in the Inter-American System States have not rejected the Court's right to a dignified life, despite the challenges involved.²⁴⁷ As mentioned above, several nations have also expressly granted the Court and the Inter-American Commission, through the San Salvador Protocol, jurisdiction over individual petitions alleging violations of the rights to unions and education.²⁴⁸ Further, potential conflicts are less of an issue in the Americas, which rely only on the Commission and the Court in this domain. As the "sole judicial organ" of the American Convention, the Court has the authority to review the Commission's decisions concerning this treaty.²⁴⁹

2. Challenges with courts adjudicating the right to a dignified life specifically

Certainly, there are risks associated with the litigation of socio-economic rights. Not only could a hostile or untrained judge distort their content, but court procedures themselves may also substantially alter the rights and their corresponding obligations. The varied limits of justiciability,

²⁴⁶ See, e.g., Varun Gauri & Daniel M. Brinks, *Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 6* (Varun Gauri & Daniel M. Brinks eds., 2008) (observing that, "under the right conditions," courts have advanced social and economic rights); Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW*, *supra* note 37, at 3 ("In a significant number of jurisdictions, adjudicatory bodies have intervened to protect a wide range of social rights"); Katharine G. Young, *Introduction*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 1-33* (Katharine G. Young ed., 2019) (presenting global trends of a "juridical revolution" in economic and social rights).

²⁴⁷ Yet the region may be less receptive to the Court's aggressive position on Article 26, initiated by *Lagos del Campo v. Peru*.

²⁴⁸ In the Inter-American System, the Inter-American Commission also has jurisdiction over the social, economic, and cultural rights established in the American Declaration. See, e.g., *Hul'qumi'num Treaty Group v. Canada*, Case 12.734, Inter-Am. Comm'n H.R., Report No. 105/09, OEA/Ser.L/V/II., doc. 51, corr. ¶ 4 (2009) (concluding that the petition is admissible with regard to alleged violations of, among others, Article XIII (Right to the benefits of culture) of the American Declaration); *Mitchell v. Canada*, Case 12.435, Inter-Am. Comm'n H.R., Report No. 61/08, OEA/Ser.L/V/II.134, doc. 5 rev. ¶¶ 67-83 (2008) (assessing an alleged violation of the American Declaration's Article XIII).

²⁴⁹ See e.g., *19 Merchants v. Colombia*, Preliminary Objection, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 93, ¶ 27 (June 12, 2002); *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 29 (June 26, 1987).

remedies, standing, ripeness, mootness, and the political question doctrine all can restrict the full expression of rights.²⁵⁰

Hallowed principles of human dignity and life, however one defines them, are no different. As soon as they are interpreted by courts, they can be diminished, or perhaps made too powerful. Commentators have warned that codifying or co-opting dignity in law can deprive it of alternative, or fuller, meanings.²⁵¹

When the right to life transforms into the right to a dignified life, as in the Inter-American System, select socio-economic rights are assimilated into life. Such a significant shift leads to immediate questions, confusion, and likely unintended consequences. First, what is the precise content of this metaright, and how can courts draw a line? As in the case of certain domestic tribunals, the Inter-American Court has identified specific social, economic and cultural elements that it believes are intrinsic to the right to life. As reviewed above, these elements currently consist of water, nutrition, health, housing, education, and ancestral lands (in the case of indigenous peoples). When the State “has not provided the basic assistance necessary” to fulfill these needs, the Court has found a violation of the right to a dignified life.²⁵²

Yet several would find fault with this attempt to identify basic requirements for a dignified life.²⁵³ If the Inter-American Court sets the bar low and merely supports survival—however that is understood—it neglects dignity’s potential to seek human prosperity. Under a basic needs approach, many in society will remain vulnerable, in “drastic material inequality,”²⁵⁴ and perhaps as “passive . . . recipients of predefined services rather than as agents involved in interpreting their needs and shaping their life conditions.”²⁵⁵ Of course, there is also disagreement as to which human needs should be considered essential under this approach, and how minimal levels should be determined. For similar reasons, the United Nations Committee on

²⁵⁰ See Young, *supra* note 167, at 161; Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 685–86 (2006).

²⁵¹ See Tina Beattie, *A Theological Reflection on Revelation, Law, and Human Dignity*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 178, at 271 (by “co-opting” dignity, the law “drains it of any alternative meaning.”).

²⁵² *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 217.

²⁵³ For an excellent critique of a minimum core approach, see generally Young, *supra* note 167. Amartya Sen has explained that even the requirements of survival remain ambiguous: “There is difficulty in drawing a line somewhere, and the so-called ‘minimum nutritional requirements’ have an inherent arbitrariness that goes well beyond variations between groups and regions.” AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* 12 (1981).

²⁵⁴ MOYN, *supra* note 9, at 213 (“[T]here turns out to be no contradiction between drastic material inequality and fulfillment of basic provision.”).

²⁵⁵ Young, *supra* note 167, at 132 (citing NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY* 174 (1989)).

Economic, Social and Cultural Rights has encountered resistance to its concept of a State's "minimum core obligation," which seeks to establish "minimum essential levels" of food, health care, housing, and education.²⁵⁶

Second, there are worries that the right to life can actually be debilitated by the *vida digna* judicial interpretation. If the right to life expands to include a bundle of social, economic, and cultural elements, a court will likely find the right violated more frequently. This could result in "norm dilution," weakening the meaning of the right to life.²⁵⁷ If copious new elements are absorbed by life, the right's content may also become unwieldy and unrecognizable.²⁵⁸ Further, it is recalled that social rights need only be achieved by States progressively, and can be limited in emergency situations.²⁵⁹ If courts integrate social rights into life, could this compromise the right to life's non-derogable and immediately-enforceable characteristics?

Third, savvy litigants and judges take calculated advantage of the force and elusive content of human dignity and dignified life. These principles are used as a trump card, in order to call attention to a case, jump the queue to justice, and defeat other claims and arguments.²⁶⁰ At the very least, dignity

²⁵⁶ U.N. CESCR, 5th Sess., General Comment 3 ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) (hereinafter General Comment 3). For more on how the Committee on Economic and Social Rights establishes State responsibility for violations of these rights, see Diane A. Desierto and Colin E. Gillespie, *A Modern Integrated Paradigm for International Responsibility Arising from Violations of Economic, Social, and Cultural Rights*, 3 CAMBRIDGE J. OF INT'L AND COMP. LAW 556–595 (2014).

²⁵⁷ Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW, *supra* note 37, at 372, 407 (discussing a "threat of serious norm dilution" in reference to Article 4 of the Convention); Tara J. Melish, *Rethinking the "Less As More" Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171, 326 (2006) (similar). See also Cismas, *supra* note 8, at 472 (also concerned with dilution of rights); Kichwa Indigenous People of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 235 ("The State considered that, within the system of guarantees established in the Convention, the right to life has priority and, therefore, the cases in which the State can be declared responsible for the violation of this right for having failed to respond with due diligence are very exceptional.").

²⁵⁸ See Melish, *supra* note 257, at 326 ("These concepts are of potentially illimitable scope, capable of subsuming into their protective embrace virtually all nationally and internationally recognized human rights."); Christian Tomuschat, *The Right to Life—Legal and Political Foundations*, in THE RIGHT TO LIFE, *supra* note 51, at 10 ("Stretching the right to life extensively, one could derive from it most of the rights set forth in the ICESCR.").

²⁵⁹ See General Comment 3, ¶¶ 1, 10 (explaining "progressive realization" and stating "it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.").

²⁶⁰ See Cismas, *supra* note 8, at 462 ("the competition among these rights to make use of the same right to life as a justiciable device is important . . . [a]nd thus, 'queue jumping' . . . is facilitated."); James L. Cavallaro & Emily Schaffer, *Rejoinder: Justice Before Justiciability: Inter-American Litigation and Social Change*, 39 N.Y.U. J. INT'L L. & POL. 345, 382 (2006) ("The key . . . is to find ways to use this right-to-life focus to advance other aspects of social justice campaigns—including ESC rights."); James

will often be employed to reinforce the reasoning for a range of rights violations.²⁶¹ In this context, some scholars urge courts to assess and balance discrete rights only, rather than amorphous concepts that envelop “moral and legal propositions whose substance originates elsewhere.”²⁶² Otherwise, an arms race can ensue, with one version of dignity pitted against another.²⁶³ Like the right to life, the concept of dignity faces the danger of being pulled in multiple directions until it rips apart.

Fourth, even some social rights advocates would disapprove of the Inter-American Court’s right to a dignified life. Subsuming social rights under a classic civil right may suggest inferiority. If social rights are only useful because they enable or support civil and political rights, this indicates that they are subordinate to their more accepted counterparts.²⁶⁴ Does this approach simply reaffirm the traditional hierarchies in the international human rights movement?

Assessing social, economic and cultural rights on their own merits, not dependent upon the right to life, offers another advantage. Disaggregating these various rights from *vida digna* facilitates their individualized development.²⁶⁵ They are important rights and they deserve intricate elaboration. Major effort, and constant input from victims, stakeholders, and experts from various disciplines, are demanded for judges to further refine the contours of these rights.

Finally, potential State resistance to these concepts, and possible damage to the Inter-American human rights institutions, should be further

L. Cavallaro & Emily J. Schaffer, *Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas*, 56 HASTINGS L.J. 217, 272 (2004).

²⁶¹ See Jean-Paul Costa, *Human Dignity in the Jurisprudence of the European Court of Human Rights*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 178, at 400 (explaining the approach of the European Court “to use the concept of human dignity to reinforce the reasoning leading to a violation of the Convention” or to reject complaints incompatible with human dignity).

²⁶² Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 577 (1982) (referring to the concept of equality). See also Conor Gearty, *Socio-Economic Rights, Basic Needs, and Human Dignity: A Perspective from Law’s Front Line*, in UNDERSTANDING HUMAN DIGNITY, *supra* note 178, at 169 (arguing for the analysis and balancing of specific rights).

²⁶³ Dignity has been established as an operative right, as opposed to a foundational principle, in the domestic law of select countries. In these nations, such as Germany and Israel, more specific interpretations often have emerged.

²⁶⁴ See WALDRON, *supra* note 175, at 10–11 (explaining that this argument concedes priority to civil and political rights).

²⁶⁵ See Tara J. Melish, *Rethinking the “Less As More” Thesis: Supranational Litigation of Economic, Social, and Cultural Rights in the Americas*, 39 N.Y.U. J. INT’L L. & POL. 171, 328 (“[S]upranational litigation of economic, social, and cultural rights [should seek to preserve] the distinct identity and dimensionality of each internationally-recognized human right.”); Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 261 (May 21, 2013) (concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, ¶ 57) (arguing for the independent development of the right to health, apart from the right to life).

examined. In these tumultuous times, both regional and international rights mechanisms have confronted backlash.²⁶⁶ While States have not appeared to challenge the Court's evolving right to a dignified life, other pertinent developments in the Inter-American System should be considered.

In 2011, a decision by the Inter-American Commission to issue non-binding precautionary measures unleashed a torrent of State protest.²⁶⁷ The Commission requested that Brazil halt construction on the Belo Monte hydroelectric power plant, a major project that endangered indigenous communities of the Xingu River Basin.²⁶⁸ As a result of this decision and others, a group of States led a "reform" movement that ultimately restricted the Commission's powers.²⁶⁹

The Commission has continued to issue precautionary measures to protect communities who face threats to their lives and health, although the process is now slower and more cumbersome.²⁷⁰ The right to a dignified life was not expressly invoked in the Belo Monte proceedings or in these more recent cases. It certainly could have been, however, and one wonders whether States will support this expansive right when it requires them to stop resource extraction initiatives and other lucrative development projects.²⁷¹

²⁶⁶ See, e.g., Contesse, *supra* note 212, at 190 ("Human rights law has been particularly affected by the broader pushback against international law."); Monika Hakimi, *International Law in "Turbulent Times," Part I*, EJILTALK! (March 6, 2018), <https://www.ejiltalk.org/international-law-in-turbulent-times-part-i/> (noting, however, that "the conflicts that occur through international law are not necessarily evidence of its weakness or dysfunction"), available at <https://www.ejiltalk.org/international-law-in-turbulent-times-part-i/>; Karen J. Alter, James T. Gathii and Laurence R. Helfer, *Backlash Against International Courts in West, East, and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293–328 (2016).

²⁶⁷ Inter-Am. Comm'n H.R., *Precautionary Measures: Indigenous Communities of the Xingu River Basin, Pará, Brazil*, PM 382/10 (Apr. 1, 2011), <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>.

²⁶⁸ *Id.*

²⁶⁹ See, e.g., Claudia Martin & Diego Rodríguez-Pinzón, *Strengthening or Straining the Inter-American System on Human Rights*, in THE INTER-AMERICAN COURT OF HUMAN RIGHTS: THEORY AND PRACTICE, PRESENT AND FUTURE, *supra* note 191, at 795, 795–822; Daniel Cerqueira, *Brazil, Ecuador, and the Inter-American Human Rights System*, AMERICAS Q., (Mar. 6, 2015), <http://www.americasquarterly.org/content/brazil-ecuador-and-inter-american-human-rights-system>; Inter-Am. Comm'n H.R. Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices (Mar. 18, 2013), reprinted in Inter-Am. Comm'n on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> (last visited Nov. 5, 2019).

²⁷⁰ For recent resolutions on precautionary measures, see, e.g., Inter-Am. Comm'n H.R., Precautionary Measure No. 43–18, Guatemala (June 18, 2018), available at <http://www.oas.org/es/cidh/decisiones/pdf/2018/43-18MC44-18-GU.pdf>; Inter-Am. Comm'n H.R., Precautionary Measure No. 12–18, Honduras (Feb. 24, 2018), available at <http://www.oas.org/es/cidh/decisiones/pdf/2018/12-18MC772-17-HO.pdf>.

²⁷¹ Here we could expect one version of *vida digna* used against another. The State could argue that, with such developmental projects, it is pursuing a dignified life for the general population.

And, one wonders, would the State dare to defy a binding Court injunction in this situation, or only Commission recommendations? Up until now, the Court has unsurprisingly shown caution when considering emergency petitions in this delicate context.²⁷² Fully committing to *vida digna* in this scenario will put the Court on a collision course with States, a path that risks weakening the Court’s institutional stability.²⁷³

3. Institutional advantages to the Court’s *vida digna* approach

International courts strive to uphold the principle of effectiveness, whereby treaty provisions should be interpreted in a way that allows them to be effective.²⁷⁴ One major institutional advantage of the *vida digna* doctrine is that it seeks to render the American Convention’s Article 4 more effective. Serious poverty, sickness, and vulnerability in Latin America result in millions of deaths and directly undermine the right to life.²⁷⁵ By devising the right to a dignified life, the Court finds a way to better protect both the endangered individuals and communities who come before it, as well as many others across the Americas.

Rights without remedies, of course, are almost meaningless; a tribunal must design a remedy that seeks to directly restore the infringed right.²⁷⁶

²⁷² See *Saramaka People v. Suriname*, Order of the Court, Inter-Am. Ct. H.R. (Sep. 4, 2013) (rejecting the Saramaka community’s request for provisional measures, but requiring “a complete, detailed and specific report on the alleged award of the mining concession on the Saramaka territory.”); *Four Ngöbe Indigenous Cmty’s v. Panama*, Order of the Court, 2010 Inter-Am. Ct. H.R. (May 28, 2010) (finding that the request for provisional measures to protect ancestral lands was not substantiated).

²⁷³ Another possible flashpoint could involve the surging numbers of Venezuelan refugees who have fled to several nations in the region. Will States be able to provide these millions of migrants with dignified living conditions? For more on the rights of migrants in the Inter-American System, see generally *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003); Sarah Paoletti, *Human Rights for All Workers: The Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System*, HUM. RTS. BRIEF, 5, 6 (2004).

²⁷⁴ See *Neuman 2*, *supra* note 167, at 1871; J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 98 (2d ed. 1993); Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT’L L. 48, 67–69 (1949).

²⁷⁵ By 2030, approximately 69 million children will die before their fifth birthday from mostly preventable causes. UNICEF, *THE STATE OF THE WORLD’S CHILDREN 2015: EXECUTIVE SUMMARY*, https://www.unicef.org/publications/files/SOWC_2015_Summary_and_Tables.pdf. According to the Economic Commission for Latin America and the Caribbean, in 2017 “the number of people living in poverty in the region reached 184 million (30.2% of the population), of whom 62 million live in extreme poverty (10.2% of the population, the highest percentage since 2008),” COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *SOCIAL PANORAMA OF LATIN AMERICA: 2018*, https://repositorio.cepal.org/bitstream/handle/11362/44396/4/S1900050_en.pdf.

²⁷⁶ See, e.g., John C. Jeffries, *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 281 (2000) (stating that rights are inextricable from remedies: they “cannot sensibly be crafted apart from remedies, or vice versa.”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (commenting that rights and remedies are “interdependent and inextricably intertwined”). The

When the Court expressly tied various socio-cultural elements to life, it justified a proportional expansion in reparations, such as housing, water, health, cultural, and educational projects. A traditional interpretation of the Convention's civil and political rights would disregard such remedies, which have been requested and proven necessary by numerous victims before the Court.²⁷⁷

To illustrate, in a situation like that of the Yakye Axa community, the Court could limit itself to finding violations of the rights to collective property and due process.²⁷⁸ It then likely would order a return of the communal lands and some degree of monetary compensation. However, finding a *vida digna* violation substantiates wider remedies such as medical attention, as well as shipments of food and potable water. In such a crisis situation, these measures are indispensable to protect the community members and safeguard the right to life.

Violations to the Convention's Article 26 will also lead to socio-cultural remedies. Testing the waters with the right to *vida digna* likely gave the Court confidence to dive deeper into the *Lagos* line of cases. But, for reasons discussed above, the use of Article 26 is more controversial to States than the right-to-life approach, and may provoke ire—especially if the Court relies on the provision to order extensive reparations. Thus, utilizing the right to *vida digna* over an Article 26 approach seems to offer an institutional advantage to the Inter-American Court.²⁷⁹

As for diluting the right to life's meaning, these concerns are reasonable given the potential scope of *vida digna*. However, as reviewed above, over

enduring international legal principle of *restitutio in integrum* provides that “reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.” *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13, 1928).

²⁷⁷ The Court has also provided these socio-cultural remedies in judgments that involved collective property violations and not a breach of the right to *vida digna*. However, as I have argued elsewhere, many of those expansive reparations programs better correspond to the fuller right to a dignified life than to a simple right to property. See Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 181 (2013) (“If indigenous norms are located in a multidimensional right to life, multifaceted reparations are facilitated . . . [i]n contrast, tethering varied indigenous rights to Article 21 could limit communities to typical property remedies and nothing more.”).

²⁷⁸ This assumes a situation where no deaths have yet occurred; with any right-to-life violation, the reparations will necessarily become more substantial.

²⁷⁹ In addition, an individualized approach to developing a range of social rights will likely require more effort, research, and argumentation by both the Court and petitioners. While these are worthy endeavors, assuming the Court has jurisdiction to do so, it should be acknowledged that saving the Court some of these efforts under the *vida digna* approach has resulted in an institutional advantage. See Neuman I, *supra* note 167, at 114–16 (pointing out that approaches to save courts time and effort provide institutional advantages, although they should also be balanced with consensual and suprapositive considerations).

the last twenty years the Inter-American Court has issued less than ten judgments on the right to a dignified life. Recently, it shows even more restraint in considering the principle. As a result, it would appear that worries about norm dilution have not been realized.

Similarly, the content and requirements of *vida digna* have not expanded to unmanageable dimensions. The Court has not extended the right beyond the modest parameters outlined in the 2010 judgment *Xákmok Kásek Indigenous Community*.²⁸⁰ Still, there is enough case law to guide States and to promote the rights of at-risk individuals and communities in the Americas.²⁸¹

Of course, litigation approaches of human rights advocates and the Inter-American Commission can change. Additional cases on the right to a dignified life will inevitably compel the Court to define its standards of risk, as well as to further detail minimum levels of food, water, health, shelter, and education. But a massive surge in petitions, in theory possible due to widespread poverty in Latin America, could present serious risks to the Inter-American System’s integrity.²⁸²

At that point, institutional considerations would counsel some narrowing of the right. The Commission and Court could make it more challenging for petitioners not belonging to traditionally-vulnerable groups to demonstrate State liability.²⁸³ Multiple cases may also be joined, and the Court could choose to emphasize structural and non-monetary remedies—for efficiency, and to save States the significant expense of individual cash damages.²⁸⁴ Fortunately, such limitations have not yet occurred; the Court’s

²⁸⁰ See Neuman 1, *supra* note 167.

²⁸¹ There is much debate about the extent to which national authorities should directly apply the American Convention and the Court’s case law, a concept known as “conventionality control.” See, e.g., García Ramírez, *supra* note 205, at 137–48; Eduardo Ferrer Mac-Gregor, *Reflexiones Sobre el Control Difuso de Convencionalidad a la Luz del Caso Cabrera García y Montiel Flores vs. México*, 131 UNAM, INSTITUTO DE INVESTIGACIONES JURÍDICAS 917 (2011) (Mex.).

²⁸² Of course, the use of the petition system before the Inter-American Commission and Court generally requires exhaustion of domestic remedies. Further, litigation before this System and other international mechanisms is also expensive and slow; unfortunately, these realities will exclude many destitute petitioners from accessing international justice.

²⁸³ See Pasqualucci, *supra* note 82, at 32 (proposing that such persons could “have a weightier burden but would still have the possibility of bringing a case for the violation of a dignified life before the Court.”).

²⁸⁴ The remedial model prioritizing non-monetary, forward-looking measures likely will be less expensive than attempts at full economic compensation. See John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 109 (1999). But see Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 673 (1983) (arguing that, if courts reduce monetary reparations for such pragmatic reasons, they should acknowledge that a full remedy has not been provided—to “leave[] open the possibility that at some point the courts will be able to furnish a more complete remedy.”).

current right to a dignified life stands as the authoritative formulation to lead the region's governments.

Finally, the argument remains that subsuming social rights under the right to life reinforces the longstanding hierarchy of rights. Yet this position neglects evolving international understandings of life. Contemporary views advanced by human rights experts consider life to constitute a social right as much as a civil right.²⁸⁵ Taken this way, *vida digna* is not just a strategy to anchor marginalized social rights onto established civil rights, in order to legitimize and protect the former. It is a manner of refining the content of a critical and complex social right. The Inter-American Court's interpretation underscores that the evolving right to life integrally belongs to both spheres of rights and in fact connects the two worlds.

IV. CONCLUSION

Twenty years ago, the Inter-American Court introduced the right to a dignified life to international human rights law. This expansive view of the right to life was recently affirmed by the United Nations Human Rights Committee. The Court has established that water, nutrition, health care, housing, education, and ancestral lands all form part of a dignified life, and has developed a broad State duty "to take positive, concrete measures" to protect individuals and communities at risk. By taking a stand on *vida digna*, the Inter-American Court recognized that life could not be meaningfully separated from several social, cultural, and economic rights. In order to fully protect the fundamental right to life, then, the Court needed to discern its broad nature, as well as order proportionate, multi-faceted measures to safeguard this right when threatened.

While any doctrine to protect human rights will suffer weaknesses, the right to *vida digna* has proven overall to be a sensible approach for the Inter-American Human Rights System, as it has reasonably balanced consensual, suprapositive, and institutional factors. The right appeals to the powerful suprapositive principle of human dignity, and, as applied by the Court, has until now managed several institutional concerns capably. Although States did not expressly agree to a right to a dignified life at the American

²⁸⁵ See, e.g., Report of the Special Rapporteur on Adequate Housing, *supra* note 51, ¶ 3 (asserting that the right to life has "dimensions" of both social and civil rights); ESCR-Net, RECOGNIZING THE INTERDEPENDENCE AND INDIVISIBILITY OF THE RIGHT TO LIFE WITH ESC RIGHTS ¶ 5 (2015), https://www.escr-net.org/sites/default/files/escr-net_srsc_gi_on_article_6.pdf ("[T]he right to life should not be interpreted narrowly or deprived of its inherent connection to ESC rights."); Villagrán Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 4 (Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli) ("This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.").

Convention’s adoption, the concept has acquired meaning and force over the years. Latin American States have not opposed its crystallization, likely because it reflects their emphasis, at least in principle, on human dignity and respectable living conditions.

A dynamic process of exchange among Inter-American Court judges, victims of human rights abuse, governments, and experts will allow the right to continue to evolve in a manner that respects the integrity of life, the values of the region, and the consent of States. If the Court stays committed to this process, it will steadily progress toward more protective and specific requirements for a dignified life. The *vida digna* approach can also inspire complementary methods to advance social rights and individually develop their content—although the Court’s recent Article 26 approach, in particular, may not adequately balance consensual, suprapositive, and institutional elements.

As for the other regional human rights systems, the European Court, rather than utilizing the right to life, has more often protected socio-economic norms under the rights to humane treatment and private life. The African Court has directly applied the various social, economic, and cultural rights enumerated by the African Charter. These varied approaches certainly are understandable, as these Courts interpret different treaties and represent constituencies with distinct histories, traditions, cultures, and legal systems. In any case, as legal institutions increasingly engage creative methods to safeguard human dignity, they should closely contemplate the strong affirmation by the Inter-American System, and now the Human Rights Committee, of the indivisibility of rights and the fullness of life.